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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 655

WILLIAM JEROME PHYLE, PETITIONER,

vs.

CLINTON T. DUFFY, WARDEN OF THE STATE PRISON AT SAN QUENTIN, STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED MARCH 1, 1948.

CERTIORARI GRANTED MARCH 8, 1948.

SUPREME COURT OF THE UNITED STATES

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[fols. 1-2] **IN THE SUPREME COURT OF CALIFORNIA**

In the Matter of the Petition of AL MATTHEWS for a Writ of Habeas Corpus or in the Alternative, a Writ of Prohibition Against CLINTON T. DUFFY, Warden of the State Prison at San Quentin, State of California, Petitioner

PETITION FOR WRIT OF HABEAS CORPUS OR IN THE ALTERNATIVE A WRIT OF PROHIBITION—Filed April 30, 1947

To the Honorable Phil S. Gibson, Chief Justice of the Supreme Court of the State of California, and the Associate Justices thereof:

The petition of Al Matthews, one of the attorneys for William Jerome Phyle, respectfully shows:

That the said William Jerome Phyle is unlawfully imprisoned, detained and restrained of his liberty by Warden Clinton T. Duffy, Warden of San Quentin Prison located at San Quentin, County of Marin, State of California.

That said imprisonment, detention, confinement and restrain- are illegal, and that the illegality thereof consists in this, to-wit: That on the 20th day of February, 1946, said William Jerome Phyle was found guilty of first degree murder in the Superior Court of the State of California, in and for the County of San Diego, and sentenced to death.

That said judgment and conviction were affirmed by the Supreme Court of the State of California on the 6th day of August, 1946 (People vs. Phyle, 28 A. C. 684).

That thereafter, sentence of death was re-imposed by the [fol. 3] Superior Court of the State of California in and for the County of San Diego on the 18th day of August, 1946, and the date of execution set for the 26th day of December, 1946.

That on the 24th day of December, 1946, after a jury trial in the Superior Court of the State of California in and for the County of Marin, William Jerome Phyle was adjudged insane, and said Superior Court committed said William Jerome Phyle to the State Hospital at Talmadge, to be held there as an insane person, and there kept in a state of confinement until his reason be restored.

That thereafter, said William Jerome Phyle remained in the Mendocino State Hospital at Talmadge, California, until January 18, 1947, at which time the Superintendent

of the Mendocino State Hospital presented to the Governor his certificate that the said William Jerome Phyle had recovered his reason, whereas said Phyle was, and still is, insane.

That thereafter, the Governor of the State of California issued to the Warden the Governor's warrant, appointing the 2nd day of May, 1947, for the execution by means of lethal gas of William Jerome Phyle.

That the Superintendent of the Mendocino State Hospital under the law of the State of California has no authority to release to Clinton T. Duffy, the said William Jerome Phyle, without an adjudication by a competent court, namely, the Superior Court of the State of California, in and for the County of Marin, or without the approval of [fol. 4] said Court; no such adjudication or approval has been made or given.

That unless this Court restrains Clinton T. Duffy from carrying out the warrant of the Governor, that the said William Jerome Phyle will be executed on Friday, the 2nd day of May, 1947.

That no prior application has been made for a writ of habeas corpus in regard to the detention or restraint complained of in this application.

That in the opinion of counsel, there is not sufficient time in which to file a writ of habeas corpus in the Superior Court of the State of California in and for the County of Marin with assurance that it would be acted upon in time to save from death said William Jerome Phyle, and said opinion is concurred in by Judge Edward I. Butler, said Judge of the Superior Court of the State of California in and for the County of Marin, who in chambers expressed the desire that the matter be directed to the Supreme Court of the State of California.

Wherefore, your petitioner prays that a writ of habeas corpus may be granted, directed to the said Clinton T. Duffy, Warden as aforesaid, commanding him to have the body of said William Jerome Phyle before your Honors at a time and place therein to be specified, to do and receive what shall then and there be considered by your Honors concerning said William Jerome Phyle, to give the time and [fols. 5-6] cause of his detention; and said writ; and that he, said William Jerome Phyle, be returned to the Mendocino State Hospital until the Superintendent thereof has fully complied with the laws of the State of California.

That said Clinton T. Duffy be restrained from carrying out the warrant of the Governor which would result in the death of said William Jerome Phyle illegally at the hands of Clinton T. Duffy on Friday, May 2, 1947.

Dated this 30th day of April, 1947.

Al Matthews, Wallace S. Myers, Attorneys for William Jerome Phyle.

Duly sworn to by Al Matthews. Jurat omitted in printing.

[fol. 7] BRIEF FOR PETITIONER

Question at Issue:

Where a prisoner has been committed to a State Hospital as insane under the provisions of the penal code, Sections 3701-3704, has the superintendent of such hospital the absolute legal right to certify to the sanity of such prisoner without the approval of the committing Superior Court or an adjudication by such Superior Court of the sanity of the prisoner.

It would seem that the question stated above has never been passed upon by any of the appellate courts of this State.

Penal Code Section 3704 is silent as to the method of determining when and how the defendant has recovered his reason.

Points and Authorities

Under California law there are variant procedures to determine the question of restoration of sanity of a person earlier declared insane, incompetent or mentally ill.

Probate Code 1470-1472
Welfare and Institutes Code 6728, 6734, 6736, 6760-2
Penal Code 1026, 1367, 3704

The procedure prescribed by the Penal Code is entirely distinct from that prescribed by the Probate Code and by the Welfare and Institutions Code.

People v. Superior Court of Contra Costa County, 4 Cal. (2) 136, 47 Pac. (2) 134.

[fol. 8] Under the procedure set forth in the Probate Code 1470-1472, the Superior Court of the State of California alone can determine whether an insane or incompetent person has recovered sanity or competency.

Under the procedure set forth in the Welfare and Institutions Code, Sections 6728, 6733, 6734 and 6736, the Superintendent of the State Hospital has the power to determine whether or not a patient is sane. However, by express provision of Section 6725 of said Code, none of the aforesaid provisions apply to any patient held upon an order of a court or judge in a proceeding arising out of a criminal action.

It would appear that Article 9, Sections 6760-6762, of the Welfare and Institutions Code expressly provides for the disposition of the Criminal Insane and that it also provides a guide for determining whether a patient is one being held upon an order of a court or judge in a proceeding arising out of a criminal action.

Before analyzing Article 9 of said Code, for the purpose of clarity, counsel wishes to set forth the various procedures contained in the Penal Code pertaining to the criminally insane or those charged with crime.

1026: Plea of Insanity at time of commission of crime.

1367: Pleas of Insanity at time of trail, judgment or punishment.

2684: Insanity of convict during term of imprisonment.

3704: Determination by Warden that prisoner under sen-
[fol. 9] tence of death is insane.

Penal Code Section 1026. A defendant committed to a State Hospital shall not be released, except by the Superior Court.

Penal Code Section 1367-1372, and Welfare and Institutions Code Section 6760. These sections provide that the certificate of the Superintendent of a State Hospital who declares that a person has recovered his sanity must be approved by the Superior Court Judge of the County from which the patient was committed.

Penal Code Section 2684. Since in the first instance there is no judicial determination of insanity, it would seem that the construction of this section is irrelevant under the question at issue.

Penal Code Section 3704. Let us assume, without assertion or innuendo, the creation of a conspiracy

among administrative officers of this State for the purpose of doing to death by legal execution a prisoner declared to be insane. If Penal Code Section 3704 be construed to give an absolute power of determination of sanity by the Medical Superintendent without the approval or intervention of judicial process, then there is no way an insane person can be protected by the Courts even though a court adjudicated such person to be insane. Such a construction would appear to be not only a violation of due process of law but an [fol. 10] obvious encroachment of the administrative branch of the government on that of the judicial function.

Necessarily, a prisoner awaiting death who has been declared insane, is in the same class as those who become insane under Section 1367. As has been noted above, before such prisoners can be declared sane, the approval of the Superior Court must be obtained. There is no case in this State holding that the approval of the Superior Court will be presumed where there has been no further proceeding in such Court, as in this case.

People v. Superior Court of Contra Costa County,
4 Cal. (2) 136;
47 Pac. (2) 134.

It would seem only reasonable that Penal Code Section 3704 deals with the criminally insane and as such, comes under the provisions of Section 6725 of the Welfare and Institutions Code, which expressly states that the Medical Superintendent's determination of the sanity of a prisoner is not applicable to the criminally insane.

In conclusion, it is difficult to see where the Medical Superintendent has obtained the power to personally and absolutely determine that the defendant has recovered his reason when he has no legislative sanction under the [fol. 11] powers of his office to so determine. It is respectfully submitted that this question is of vital interest to every citizen of the State of California and should be definitely determined by this Court.

[fols. 12-13] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

In the Matter of the Petition of Matthews on Behalf of WILLIAM JEROME PHYLE for Habeas Corpus or Prohibition

ORDER DIRECTING ISSUANCE OF A WRIT OF HABEAS CORPUS—May 1, 1947

Let a writ of habeas corpus issue, returnable before this Court at its courtroom in San Francisco, on Wednesday, May 7th, 1947, at ten o'clock a.m.

Gibson, Chief Justice.

[File endorsement omitted.]

[fol. 14] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Crim. No. 4797

In the Matter of the Petition of Al Matthews for writ of habeas corpus on behalf of WILLIAM JEROME PHYLE

RETURN OF CLINTON T. DUFFY, WARDEN OF SAN QUENTIN STATE PRISON, ON WRIT OF HABEAS CORPUS—Filed May 7, 1947

I, Clinton T. Duffy, Warden of the San Quentin State Prison, in obedience to the order contained in the Writ of Habeas Corpus issued out of the above-entitled court in the above-entitled proceeding do hereby make this return to the said Honorable Court:

That before the coming to me of the Writ, William Jerome Phyle was committed to my custody by virtue of a commitment and warrant issued out of the Superior Court of the State of California, in and for the County of San Diego, in an action entitled "The People of the State of California vs. William Jerome Phyle," in the files of said court; that thereafter said William Jerome Phyle was removed to the Mendocino State Hospital at Talmage, California, pursuant to an adjudication by the Superior Court [fol. 15] of the State of California in and for the County of Marin that he was an insane person; that thereafter and on

January 18, 1947, the Superintendent of the Mendocino State Hospital made and presented to the Governor of the State of California a certificate that said William Jerome Phyle had recovered his reason; that thereafter the Governor of the State of California issued his warrant to the undersigned Warden appointing the 2d day of May, 1947, for the execution of said William Jerome Phyle.

That the undersigned Warden holds the said William Jerome Phyle pursuant to said commitment, sentence and warrant, true copies of which are attached hereto.

(Signed) Clinton T. Duffy, Warden of San Quentin State Prison; (Signed) Fred N. Howser, Attorney General of the State of California; (Signed) Clarence A. Linn, Deputy.

[fol. 16] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

No. 130157

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

WILLIAM JOHN PHYLE, true name WILLIAM JEROME PHYLE, Defendant

ORDER PRONOUNCING JUDGMENT OF DEATH UPON DEFENDANT AFTER AFFIRMATION ON APPEAL BY THE SUPREME COURT—September 18, 1946

To the Warden of San Quentin Penitentiary, State of California, Greetings:

Whereas, heretofore on the 18th day of December, 1945, the defendant, William John Phyle, true name William Jerome Phyle, was before the above entitled court upon an information charged with the crime of murder, in that he did on or about the 24th day of November, 1945, wilfully, unlawfully, feloniously and of his malice aforethought, kill and murder one Elmer Edward Frazee, a human being then and there being and existing; and

[fol. 17] Whereas, upon the 18th day of December, 1945, the defendant William John Phyle, true name William

Jerome Phyle, entered a plea of not guilty and not guilty by reason of insanity to the crime of murder as charged in the information on file herein; and

Whereas, thereafter, to wit, on the 19th day of February, 1946, by leave of court first had and obtained, the said defendant William John Phyle, true name William Jerome Phyle, withdrew his said pleas of not guilty and not guilty by reason of insanity, and on said day entered a plea of guilty to the crime of murder as charged in the information; and

Whereas, thereafter, on the 20th day of February, 1946, the Court having heard and considered evidence for the purpose of fixing the degree of said crime, fixed and adjudicated the degree thereof as murder of the first degree and on said date, the court having further heard and considered evidence for the purpose of ascertaining the sanity or insanity of the defendant, and the court having adjudicated that the defendant was sane both at the time of the commission of the aforesaid crime of murder and at the time of the entry of his plea of guilty thereto, and no motion for new trial having been made by or on behalf of the said defendant, the Court did, on the 20th day of February, 1946, the said defendant in person and by his counsel having waived the time for the pronouncement of judgment, the [fol. 18] Court did arraign said defendant for judgment and did order, adjudge and decree that the defendant having entered his plea of guilty of murder, and the degree thereof having been adjudicated to have been murder of the first degree, and the defendant having been found sane at the time of the commission of the said murder and having been found to have been sane at the time of the entry of his plea of guilty to the charge of murder, suffer the penalty of death by the administration of lethal gas until he is dead, said sentence to be executed by the Warden of San Quentin Penitentiary, and said defendant William John Phyle, true name William Jerome Phyle, was thereby remanded to the custody of the Sheriff of San Diego County who was directed to deliver him, the said defendant, to the Warden of San Quentin penitentiary within ten (10) days, to be held pending a decision upon an appeal from said judgment of said Court; and

Whereas, an automatic appeal was taken on behalf of the said defendant from the judgment of death so pronounced

upon him to the Supreme Court of the State of California; and

Whereas, on the 6th day of August, 1946, the Supreme Court of the State of California made and entered its order and judgment in said cause affirming the order and judgment of this Court heretofore pronounced, made and entered on the 20th day of February, 1946; and

Whereas, it appears that the execution of said judgment of death made herein on the 20th day of February, 1946, [fols. 19-20] remains unexecuted by reason of the appeal on behalf of said defendant having stayed execution and that said judgment is now final and in full force and effect, a certified copy of said original judgment of the Supreme Court of the State of California issued under the seal of said court was duly received and filed by the Clerk of this court on September 10, 1946, and was by the Clerk of this court entered in Judgment Book 112 at page 253 thereof on September 16th, 1946, which said judgment is now final.

Now, therefore, on application of the District Attorney of San Diego County, State of California, it is hereby ordered, adjudged and decreed that the order and judgment of death heretofore on the 20th day of February, 1946, pronounced upon the defendant William John Phyle, true name William Jerome Phyle, be executed as recited therein, to wit: It is ordered by this Court that on Friday, the 6th day of December, 1946, being a day not less than sixty (60) days nor more than ninety (90) days from the time of the making of this order, between the hours of sunrise and sunset on said day and within the walls of said state prison at San Quentin, the Warden thereof execute said judgment of death heretofore pronounced as aforesaid by this Court against said defendant by the administration of lethal gas to said defendant William John Phyle, true name William Jerome Phyle, until he is dead.

Done in open Court this 18th day of September, 1946.

Joe L. Shell, Judge of the Superior Court.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 21] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN DIEGO

No. 130157

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

WILLIAM JOHN PHYLE, True Name WILLIAM JEROME PHYLE, Defendant

WARRANT OF EXECUTION UPON JUDGMENT OF DEATH—September 18, 1946

To the Warden of San Quentin Penitentiary, State of California, Greetings:

Whereas, Heretofore on the 18th Day of December, 1945, the defendant William John Phyle, true name William Jerome Phyle, was before the above-entitled court upon an information charged with the crime of murder in that he did on or about the 24th day of November, 1945, wilfully, unlawfully, feloniously and of his malice aforethought kill and murder one Elmer Edward Frazee, a human being then and there being and existing; and

Whereas, upon the 18th day of December, 1945, the defend-[fol. 22] ant William John Phyle, true name William Jerome Phyle, entered a plea of not guilty and not guilty by reason of insanity to the crime of murder as charged in the information; and thereafter, to-wit: on the 19th day of February, 1946, by leave of court first had and obtained, said defendant, William John Phyle, true name William Jerome Phyle, withdrew his said plea of not guilty and not guilty by reason of insanity, and on said day entered a plea of guilty to the crime of murder as charged in the information; and

Whereas, thereafter on the 20th day of February, 1946, the Court, having heard and considered evidence for the purpose of fixing the degree of said crime, fixed and adjudicated the degree thereof as murder of the first degree; and the Court having further heard and considered evidence for the purpose of ascertaining the sanity or insanity of the defendant, and the Court having adjudicated the fact to be that the defendant was sane both at the time of the commission of the aforesaid crime of murder, and at the time of the entry of his plea of guilty thereto; and

Whereas, thereafter on the 20th day of February, 1946, the said defendant was arraigned before the said Court for judgment, and being arraigned for judgment, the Court did thereupon order, adjudge and decree that the defendant having entered a plea of guilty of murder, and the degree thereof having been fixed by the Court as murder of the first degree, and having been found sane at the time of the commission of [fol. 23] said murder and at the time of the entry of his plea of guilty of murder, suffer the penalty of death by the administration of lethal gas until dead, this sentence to be executed by the Warden of San Quentin Penitentiary, and the defendant was thereupon remanded to the custody of the Sheriff of San Diego County, who was directed to deliver the said William John Phyle, true name William Jerome Phyle, the defendant, to the Warden at San Quentin Penitentiary within ten (10) days to be held pending decision on the appeal from this judgment; and

Whereas, on the 18th day of September, 1946, this Court did make and cause to be entered its order reimposing and pronouncing sentence and judgment of death upon the defendant, after the affirmation by order and judgment of the Supreme Court of the State of California, on the 6th day of August, 1946, of the judgment of this Court on the 20th day of February, 1946, aforesaid; and there being no legal cause why the warrant of execution upon the judgment of death made and entered on the 20th day of February, 1946, should not be carried out according to law;

Now, Therefore, pursuant to law, It Is Ordered by the Court that on Friday, the 6th day of December, 1946, between the hours of sunrise and sunset of said day and within the walls of said state penitentiary at San Quentin, the said Warden thereof execute the said judgment of death as aforesaid by said Court against said defendant William John [fol. 24] Phyle, true name William Jerome Phyle, by the administration of lethal gas to the said defendant William John Phyle, true name William Jerome Phyle, until he is dead.

Done in Open Court this 18th day of September, 1946.

Joe L. Shell, Judge of Said Superior Court.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 25] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MARIN

In the Matter of WILLIAM JEROME PHYLE, San Quentin Number A3240

ORDER DIRECTING CONFINEMENT OF THE DEFENDANT IN THE STATE HOSPITAL FOR THE INSANE—Filed December 24, 1946

It Appearing from the petition of A. E. Bagshaw, District Attorney of the County of Marin, State of California, that the defendant, William Jerome Phyle is commited to and incarcerated in the California State Prison at San Quentin, under and by virtue of a commitment issued out of the Superior Court of the State of California in and for the County of San Diego on the 20th day of February, 1946, for the crime of Murder in the First Degree, and under a sentence of death, and

It Further Appearing from the said petition that there is reason to believe that the said William Jerome Phyle is presently insane, and

A jury having been summoned and impaneled to hear an inquiry into the question of the sanity of the said defendant, and

Evidence having been introduced before the said jury to [fols. 26-27] show that the said defendant is insane and the said jury having returned its verdict on the 23rd day of December, 1946, finding that the said defendant, William Jerome Phyle is presently insane;

Now, Therefore, it Is Ordered, Adjudged and Decreed that the said William Jerome Phyle be taken to a state hospital for the insane and be there kept in safe confinement until his reason is restored.

It Is Further Ordered that when the said William Jerome Phyle recovers his reason, that the Superintendent of the State Hospital in which he is confined certify that fact to the Governor of the State of California for further proceedings as is required by law.

Defendant is remanded to the custody of the Warden of the California State Prison at San Quentin.

Done in Open Court this 24th day of December, 1946.

(S.) Edward I. Butler, Judge of the Superior Court.

[fol. 28] DR. RAPAPORT'S CERTIFICATE OF SANITY

EARL WARREN

Governor of California

Walter Rapaport, M. D., Superintendent and Medical Director.

Dora Shaw Heffner, J. D., S. S. A. D., Director of Mental Hygiene.

State of California

Department of Mental Hygiene

Mendocino State Hospital

Talmage, California

January 18, 1947.

Honorable Earl Warren, Governor, State Capitol, Sacramento, California.

In Re: WILLIAM PHYLE

DEAR GOVERNOR WARREN:

The above-named William Jerome Phyle, heretofore committed to and incarcerated in the California State Prison at San Quentin under and by virtue of a commitment issued out of the Superior Court of the State of California in and for the County of San Diego on the 20th day of February, 1946, for the crime of murder in the first degree and under a sentence of death, was received at the Mendocino State Hospital December 27, 1946 pursuant to an order made by the Superior Court of the State of California, in and for the County of Marin, in a case entitled, "In the Matter of William Jerome Phyle San Quentin Number A3240," directing confinement of the defendant in a state hospital for the insane.

Said William Jerome Phyle has been under observation since his admission to determine his mental condition.

[fol. 29] Observation and examinations by expert psychiatrists in the Mendocino State Hospital have failed to reveal any evidence of mental illness in said William Jerome Phyle. Subject freely and frankly admits that the statements made relative to hearing voices, were untrue at the time he made them and that he knew they were untrue at that time. Subject further states that he has never heard imaginary voices at any time. Observation and examinations failed to reveal any hallucinations, delusions or ideas

of reference. Subject is alert, oriented for time, place and person, has no memory or retention defects, he understands and appreciates the reasons for his confinement at San Quentin and at this hospital. The subject fully comprehends the nature and quality of the proceedings relative to his situation. He knows that he has been sentenced to death and fully understands the meaning of that sentence. He tells vividly of the crime leading up to his arrest, conviction and sentence. He explains his admission of hearing voices as being the result of a conference he had at San Quentin Prison on the Wednesday just prior to the Friday he was to enter the gas chamber, at which conference it was suggested to him that the Lieutenant Governor, State of California, and then acting as Governor, was considering a reprieve or words to that effect; that from the questions he asked which subject volunteers he considered leading, he realized that in order to avoid being put to death it would be necessary for him to be found insane and so in answer to said questions subject Phyle states he responded in the [fols. 30-31] affirmative when it appeared to him that such responses would indicate an abnormal mental condition.

Examination shows subject Phyle to be a callous, hardened individual, who expresses no remorse over his crime of murder, stating that Frazee was not a policeman, had no business interfering with Phyle, was warned by Phyle to keep away but did not heed the warning and so was deserving of what he sustained.

In view of the facts as ascertained by observation and examinations here it is my opinion that said William Jerome Phyle is sane, has full possession of his reason and, therefore, pursuant to Section 3704 of the California Penal Code and in compliance with the order of the Superior Court, State of California, in and for the County of Marin, made on December 24, 1946, I, Walter Rapaport, M. D., Superintendent of the Mendocino State Hospital, do hereby certify that said William Jerome Phyle is presently sane and in possession of his reason.

Respectfully submitted, (S.) Walter Rapaport, M. D.,
Superintendent.

WR:hw.

CC Adult Authority, San Quentin Prison, San Quentin, Calif.

Dept. of Mental Hygiene, Sacramento, California.

[fol. 32] GOVERNOR'S WARRANT—JAN. 30, 1947 (PURSUANT TO PENAL CODE SECTION 3704)

To: Richard A. McGee, Director of the Department of Corrections of the State of California.

To Clinton T. Duffy, Warden of San Quentin Prison:

GREETINGS:

Whereas, on the 20th day of February, 1946, William Jerome Phyle, San Quentin No. A-3240, was found guilty of murder in the first degree by verdict of a jury in the Superior Court of San Diego County, No. 130157 in the files thereof, and was sentenced by judgment of the said Superior Court to suffer the penalty of death by lethal gas, said execution to take place at the California State Prison at San Quentin; and

Whereas, Thereafter an appeal was taken from said judgment of conviction to the Supreme Court of the State of California and said Supreme Court affirmed said judgment on the 6th day of August, 1946, and issued its remittitur to the Superior Court of San Diego County under date of September 6, 1946; and

Whereas, thereafter on September 18, 1946, the Superior Court of San Diego County made its further judgment that the said William Jerome Phyle suffer the penalty of death, and set the execution of said judgment for December 6, 1946, within the walls of the State Prison at San Quentin; and

Whereas, the Acting Governor of California by reprieve [fol. 33] extended the date of said execution from Friday, December 6, 1946, to Friday, February 7, 1947; and

Whereas, while said defendant was awaiting execution of said judgment at San Quentin Prison, a sanity hearing was held in the Superior Court in the County of Marin, and on December 24, 1946, the said Superior Court made its order that said William Jerome Phyle was insane and that he be committed to the State Hospital at Talmage and held there as an insane person and there kept in safe confinement until his reason is restored; and

Whereas, thereafter said defendant has remained in the Mendocino State Hospital, and under date of January 18, 1947, the Superintendent of the Mendocino State Hospital presented to the Governor his certificate, (as provided in Section 3704 of the Penal Code) that the said William Jerome Phyle is sane; and

Whereas, under the provisions of Section 3704 of the Penal Code it is required that the Governor, upon presentation of said certificate, must thereupon issue to the Warden the Governor's warrant appointing a day for the execution of the judgment;

Now, Therefore, for the purpose of complying with the terms of said statute, the undersigned, as Governor of California, does hereby appoint Friday, the 2nd day of May, 1947, for the execution of said judgment and sentence of death of said William Jerome Phyle, San Quentin No. [fol. 34] A-3240, in accordance with the terms thereof as rendered by the Superior Court of the State of California in and for the County of San Diego, as shown in the records, papers and files of said Superior Court, No. 130157, and in accordance with the records, papers and files pertaining thereto in the office of the Warden of San Quentin Prison, State of California. You will, upon receipt of this warrant, return the said William Jerome Phyle from the Mendocino State Hospital to a California State prison pending the execution of said judgment.

In Witness Whereof, I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 30th day of January, A. D., One Thousand Nine Hundred and Forty-seven.

(S.) Earl Warren, Governor of California.

Attest: (S.) Frank M. Jordan, Secretary of State, by Charles J. Hagerty, Deputy Secretary of State. (Seal.)

[fol. 35] [File endorsement omitted.]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

In the Matter of the Petition of AL MATTHEWS, on behalf of WILLIAM JEROME PHYLE, for a Writ of Habeas Corpus or in the alternative, a Writ of Prohibition against Clinton T. Duffy, Warden of the State Prison at San Quentin, State of California, Petitioner.

OPINION—November 10, 1947

William Jerome Phyle was found guilty of first degree murder and sentenced to be executed. The judgment was affirmed by this court (People v. Phyle, 28 Cal. 2d 671), and

the date of execution was set for December 26, 1946. While defendant was awaiting execution at the state prison at San Quentin, the warden of that prison initiated proceedings pursuant to section 3701 of the Penal Code to determine the question of defendant's sanity. After a jury trial defendant was adjudged insane and committed to the Mendocino State Hospital. On January 18, 1947, the superintendent of that hospital certified to the Governor that defendant had [fol. 36] recovered his reason. The Governor then issued a warrant to the warden of the state prison at San Quentin appointing May 2, 1947 the day of execution. One of defendant's attorneys filed a petition for a writ of habeas corpus in this court, contending that the Superintendent of the Mendocino State Hospital has no authority under the law of this state to release the defendant to the warden of the state prison at San Quentin without an adjudication of a competent court that defendant has recovered his reason. This court issued the writ for the purpose of giving consideration to this contention.

Section 1367 of the Penal Code provides that "A person cannot be tried, adjudged to punishment, or punished for a public offense while he is insane." The question of defendant's sanity at the time of the commission of the offense or at the time of his conviction or sentence is not involved in this proceeding. The only question presented is whether a person who has been adjudged insane after conviction, sentence, and delivery to a warden of a state prison for execution, has the right to a judicial determination of the question of his restoration to sanity.

The procedure for determining the question of the sanity of a prisoner under sentence of death is specified in sections 3700 to 3704 of the Penal Code. Section 3700 provides that, "No judge, court, or officer, other than the Governor, can [fol. 37] suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken." Four of the six sections referred to relate to the question of the prisoner's sanity. The other two, which prescribe the procedure for determining the question of the pregnancy of a woman sentenced to death, are not material in this case.

Section 3701 provides for the determination of the question of defendant's sanity after he has been delivered to

the state prison: "If after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into." Section 3702 provides the procedure for the hearing held pursuant to section 3701. Section 3703 provides that "the verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when [fol. 38] it is found that the defendant is insane, the order must direct that he be taken to a State hospital for the insane and there kept in a state of confinement until his reason is restored."

Section 3704 provides for the disposition of the defendant after the court's order is entered: ". . . if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. *When the defendant recovers his reason, the superintendent must certify that fact* to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment." (Italics added.)

It is apparent from a reading of sections 3700 to 3704 of the Penal Code that there is no provision for a judicial determination of the question of the sanity of a defendant delivered to the warden of a state prison for execution except as set forth in section 3701. In fact, section 3700 expressly provides that after the defendant has had his appeal to this court, the execution of his sentence lies exclusively within the control of the Governor, and the warden of the prison.

[fol. 39] Petitioner contends, however, that the question of restoration to sanity after a judicial determination that defendant is insane is necessarily a judicial question and that the statute must be interpreted as if it provided that,

"*when it has been judicially determined that defendant has recovered his reason* the superintendent must certify that fact to the Governor . . ." Petitioner maintains that in view of the cases construing statutory provisions regarding the restoration to sanity of a defendant adjudged insane during the course of his trial (Penal Code §1367-1372) defendant has a right to a judicial determination of the question of his restoration to sanity. Petitioner relies on the rule that a person confined in a state hospital pursuant to those provisions has a right to habeas corpus to determine whether his sanity has been restored. (Gardiner v. Jones, 126 Cal. 614, 618; In re Buchanan, 129 Cal. 330, 331; see People v. Superior Court, 4 Cal. 2d 136, 145.) It is true that a defendant committed to such an institution has a right to his release therefrom, if it is determined on habeas corpus that he is improperly held because he is presently sane. If it is found that he is sane, he is returned to the custody of the sheriff and his trial proceeds. (In re Buchanan, supra at p. 336.) In the present case, petitioner does not seek release of defendant from the state hospital, on the ground that he is sane, for if he were found sane he [fol. 40] would be delivered to the warden for execution. Instead, petitioner seeks the return of defendant to the state hospital, on the ground that he was improperly discharged therefrom. There is no authority, however, for the proposition that defendant has a right to habeas corpus or other judicial proceeding to determine the question of his sanity after his release from the state hospital. In fact section 3700 of the Penal Code expressly prohibits such a proceeding. Once the superintendent certifies that defendant is sane, he is remanded to the custody of the warden for execution and "No judge, court or other officer other than the Governor" can then suspend the execution of the judgment, "except the warden of the State Prison to whom he is delivered. . . ."

Nor is there any provision for the superintendent to initiate judicial proceedings to ascertain the fact to which he certifies. The superintendent is not authorized, as the warden is, to call the question to the attention of a district attorney for a judicial determination. Instead, it is his duty to certify the fact to the Governor "who must thereupon issue his warrant appointing a day for the execution. . . ." Since the method of determining the question of the sanity of a person awaiting execution is controlled by the

Legislature and since the Legislature has provided in Penal Code section 3700 that the courts cannot suspend the execu- [fol. 41] tion of a judgment of death and has provided in section 3701 for a judicial proceeding to determine the question of defendant's sanity only when the warden invokes such a proceeding, it is clear that the question of restoration to sanity under section 3704 is a question for the determination of the superintendent.

This interpretation of section 3704 is in accord with the interpretation by this court of the almost identical language of section 1372, which relates to the question of the restoration to sanity of a person who has been judicially adjudged insane before conviction. Section 1372, which was amended to its present form at the same time as the provisions with respect to the restoration to sanity of a person adjudged insane after conviction and sentence (Stats. 1905, pp. 699, 704),* provides: "If the defendant is received into the state hospital he must be detained there until he becomes sane. *When he becomes sane the superintendent must certify that fact* to the sheriff and district attorney of the county. The sheriff must thereupon . . . place him in [fol. 42] proper custody until he is brought to trial or judgment as the case may be, or is legally discharged." (Italics added.)

In construing section 1372 in People v. Superior Court, 4 Cal. 2d 136, 144-147, this court held that the question of defendant's restoration to sanity is for the superintendent to determine. The court stated that once a person has been committed to a state hospital under section 1372, " 'no

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* In 1905 the provisions of 3704 were contained in section 1224, which was repealed and re-enacted in 1941 as section 3704 with the addition of the last phrase that "the warden shall thereupon return the defendant to the state prison pending the execution of the judgment." Section 10000 adopted at the same time provides that, "The provisions of Part 3 of this code [which includes sections 3700 to 3704], in so far as they are substantially the same as existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments." The addition of the last phrase to section 3704 is clearly not material to this case or to the interpretation of that section with respect to the duties of the superintendent.

court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon a writ of *habeas corpus*. The power to discharge him otherwise than upon *habeas corpus* is vested exclusively in the officers of the asylum' . . . The Penal Code undoubtedly prescribes the exclusive manner by which the proceedings shall be set in motion when the defendant is restored to sanity or is not insane." (People v. Superior Court, supra at 145.) After the superintendent determines that a defendant placed in his custody pursuant to sections 1370 to 1372 of the Penal Code is sane, the defendant is returned to the court in which his trial had begun. It is not necessary for the verdict finding him insane to be vacated before the trial court may proceed. (People v. Rice, 83 Cal. App. 55, 60.)

When the provisions in question of both section 1372 and section 3704 were adopted in 1905, a substantially similar provision of the Criminal Practice Act (§591, stats. 1851, [fol. 43] p. 278) relating to the restoration to sanity of a person adjudged insane before judgment had already been interpreted by this court. Section 589 of that act provided for the delivery of a person found to be insane before judgment to the custody of a "proper person" and for his redelivery by such person to the sheriff upon his becoming sane. Section 591 provided that, "If the defendant be received by the person so appointed he must be detained by him until he becomes sane. *When he becomes sane, such person shall give notice* to the Sheriff and District Attorney of the County *of that fact.*" (Italics added.) In People v. Farrell, 31 Cal. 576, 580, it was held that this provision did not require a judicial determination of the question of restoration to sanity and that the verdict of insanity under which the defendant was committed did not have to be vacated before the defendant could be tried. Accordingly, it was not error for the trial court to proceed with the trial of the defendant without instituting "some form of judicial inquiry into the present sanity of the accused." (People v. Rice, 83 Cal. App. 55, 60, supra; People v. Superior Court, 4 Cal. 2d 136, 144-147, supra.)

Since these statutes are obviously *in pari materia*, the interpretation of a sentence in one controls the interpretation of virtually the same sentence in the other. It must be assumed also that when the Legislature adopted the present provisions of section 3704, it was aware of the

[fol. 44] construction that had been given section 591 of the Criminal Practice Act.

Petitioner contends, however, that section 3704 is modified by section 6760 of the Welfare and Institutions Code, which provides: "A patient committed to a State hospital under the provisions of Chapter VI, Title X Part II of the Penal Code, shall, upon the certificate of the superintendent that the person has recovered, approved by the superior judge of the county from which the patient was committed, be redelivered to the sheriff of such county, and dealt with in accordance with the provisions of the above-mentioned chapter of the Penal Code." Even if it be assumed that this section requires a judicial determination of the question of the restoration to sanity of one committed pursuant to the chapter of the code referred to (cf. People v. Superior Court, supra, 143-146), it clearly has no application to the present case, for petitioner was not committed under the provisions of that chapter of the Penal Code, but under the provisions of Chapter 2, Title 3, Part 3 of that code with respect to which there is no provision comparable to section 6760 of the Welfare and Institutions Code requiring approval of the superintendent's certificate by the superior judge of the county from which the patient was committed.

Petitioner contends also that there is an inherent judicial power to determine the question of restoration to sanity, regardless of the statutes. He cites for this proposition the [fol. 45] case of People v. Scott, 326 Ill. 327, 338 [337 N. E. 247] wherein it was held, in the absence of a statutory provision regarding restoration to sanity, that a jury trial of the question of sanity was proper. Where there is a statute that declares that the superintendent of the state hospital where the prisoner is confined may declare the prisoner's sanity restored, a person awaiting execution has no right to a judicial determination of his restoration to sanity. (Barret v. Commonwealth, 202 Ky. 153, 160 [259 S. W. 25]. By adopting section 3700 of the Penal Code prohibiting the courts from suspending the execution of a judgment of death, except on appeal, the Legislature has provided in effect that the courts of this state are without power, except as provided by statute, to determine the sanity of a person who has been sentenced to be executed for a capital offense and is in the custody of the warden of a state prison for the purpose of execution. (See People v. Sloper, 198 Cal. 601, 608.) Thus, regardless of what the

common law powers of a court may be, when the procedure for the determination of the question of the sanity of a person who has been sentenced to death is covered by statute, a court has no inherent power to determine that question and such a person has no right to a judicial determination of the question unless the statutes so provide. (State v. Alexander, 87 Utah 376, 381, 49 P. 2d 408; Howell v. Kincannon, 181 Ark. 58, 24 S. W. 2d 953, 956; Cribb v. Parker, [fol. 46] 119 Ga. 298, 46 S. E. 110; Baughn v. State, 105 Ga. 554, 28 S. E. 68, 70; Nobles v. Georgia, 168 U. S. 398, 404; see Baranoski's case, 9 Pa. Co. Ct. 264, 266; cases collected 49 A. L. R. 804; 38 L. R. A. 577, 588.).

In California, moreover, this matter has never been governed by common law principles. Since the first Criminal Practice Act in this state (§505, Stats. of 1850, p. 312; §473 of the Criminal Practice Act of 1851, stats. of 1851, p. 264; §1224 of Penal Code of 1872), the question of the sanity or restoration to sanity of such prisoners has been governed by statute. Until 1905, either the Governor or a judge of the trial court could determine whether or not a prisoner was sane and order his execution after he had been found insane by an inquisition. This provision was changed in 1905 by an amendment to section 1224 of the Penal Code whereby all reference to the court was omitted and the Governor was directed to issue a warrant for the execution of the prisoner on receipt of a certificate from the superintendent of the hospital. Section 3704 is a continuation of this provision. (Penal Code §10000.) The courts of this state have therefore never had the right, independent of statute, to determine the question of the restoration to sanity of a defendant who is in the custody of a warden of a state prison for execution pursuant to a lawful judgment of death.

The question remains whether the statutory procedure for determining the question of restoration to sanity is [fol. 47] constitutional. Petitioner contends that defendant has a right to an adjudication of the question of his sanity, protected by the due process clauses of the Constitution of the United States and the Constitution of California. There is no such right under either constitution. The United States Supreme Court has held that the procedure for determining the question of the sanity of a person who has been properly convicted of a capital offense and sentenced to death is a matter for the Legislature and courts of the

jurisdiction in which the defendant is convicted and presents no federal question. (Nobles v. Georgia, 168 U. S. 398, 404.) On this ground the court affirmed a decision by the Supreme Court of Georgia (Baughn v. State, 105 Ga. 554, 28 S. E. 68, 70, 38 L. R. A. 577) that under the laws of Georgia a person convicted of a capital offense and sentenced to death who thereafter becomes insane has no right to a judicial determination of the question of his sanity. (See also, cases collected in 49 A. L. R. 804.) We see no reason why the due process clause of the California Constitution should be interpreted differently.

The statutes of this state therefore provide the measure of defendant's rights to any determination of the question of his sanity. Defendant has thus far been afforded the full protection of those statutes. He was entitled to a judicial determination of the question of his sanity after conviction [fol. 48] and sentence only because the warden of the state prison at San Quentin believed that he was insane. The effect of the adjudication that he was insane was to prevent his execution until the superintendent of the state hospital to which he was sent certified that he had recovered his reason. His only right to another judicial determination of that question depends on the belief and action of the warden of the prison to whose custody he has been returned. (See, People v. Farrell, 31 Cal. 576, 581; People v. Rice, 83 Cal. App. 55, 61.)

This court has already decided that the authority given the warden constitutes adequate protection to one who has been properly convicted of a capital offense. In People v. Sloper, 198 Cal. 604, 607-608, the defendant was convicted of murder in the first degree and sentenced to death. On appeal to this court, the judgment was affirmed. Defendant then sought to prevent the fixing of a date for execution and to obtain a trial on the question of his sanity. Upon the denial of this motion defendant applied to this court for a stay of execution. In denying the application, this court, on the authority of Penal Code section 1221 (now section 3700), held that no court in this state has the power to suspend the execution of a judgment of death to determine the question of the sanity of a person who became insane after his conviction and sentence. The court stated that "adequate statutory provision is made for the complete protection of the rights of a defendant [fol. 49] who may have become insane after his conviction

and sentence. . . . If it be found that defendant is insane [pursuant to these statutes], the court must direct that he be taken to one of the state hospitals for the insane, and there kept in safe confinement until his reason is restored. When the defendant recovers his reason the superintendent of the hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment. . . . . We must conclude, therefore, that it was the intention of the legislature to limit the jurisdiction of the trial court, in proceedings of this nature to the making of the orders necessary to carry the judgment into effect. We are of opinion also, that, in view of the comprehensive and adequate provision made for the determination of the question of the sanity of a defendant who is alleged to have become insane after the rendition of a judgment of death, no substantial right of the defendant Sloper was affected by the action of the court below in denying his motion. . . . If it be a fact in this case that the condemned man is insane, it must be assumed that the warden of the state prison will do his full duty to the end that the question of the prisoner's sanity may be judicially determined."

In the Sloper case, there was no prior adjudication of insanity, but the opinion contains a clear expression of approval of the procedure thus far followed in the present [fol. 50] case. Petitioner contends, however, that because a court of law determined that the defendant was insane, only a court of law can determine that he is now sane. This contention is clearly inconsistent with section 3700 of the Penal Code and with the cases interpreting the provision of section 1372 of that code similar to the provision of section 3704. Sections 3700-3704 of the Penal Code provide for the adjudication, not of some continuing status, but only of the question whether the defendant is sane at the time of the hearing initiated by the warden. Moreover, the adjudication relied on by the petitioner did not purport to decide what the condition of defendant's mind would be thereafter. There was no determination that defendant's insanity was incurable, even if it is assumed that such a determination would have been within the court's jurisdiction. The defendant was found insane at that time, and his execution was suspended only until he recovered his reason. It was the order of the court that the defendant be kept in confinement in the state hospital

until he recovered his reason and "when said William Jerome Phyle recovers his reason, that the Superintendent of the State Hospital in which he is confined certify that fact to the Governor of the State of California for further proceedings as is required by law." There is therefore no merit to the contention that the adjudication that defendant was insane at the time of this trial gave him a vested right to the status of an insane person thereafter or until [fol. 51] a court of law determined that he is sane.

The petitioner contends also that the separation of powers provision of section 1 of Article 3 of the California Constitution is violated by leaving the final determination of a prisoner's sanity to administrative officers. The contention that the power to determine the question of restoration to sanity of such a person cannot be given to the superintendent has already been answered adversely in this state in People v. Superior Court, 4 Cal. 2d 136, 146, supra, and People v. Rice, 83 Cal. App. 55, 60, supra. In these cases it was held to be within the proper scope of the superintendent's powers to determine the question of the restoration to sanity of defendants who had been adjudged insane before conviction. Thereafter the defendants were returned to the judge pursuant to section 1372 of the Penal Code and their trial continued. The judge at that time could again have concluded pursuant to section 1368 that it was doubtful whether the defendant was sane, and provided for a determination of the question in a proper judicial proceeding. (See People v. Farrell, 31 Cal. 576, 581, supra; People v. Rice, supra at 61.) In this case that power and duty is given to the warden by section 3701 of the Penal Code, for the defendant is returned, not to a court but to the warden.

Even if the warden's power in this regard is judicial, there is no violation of section 1 of Article 3 of the Cali- [fol. 52] fornia Constitution, for section 7 of Article 10 specifically provides that "*Notwithstanding anything contained elsewhere in this Constitution,* the Legislature may provide for the establishment, government, charge and superintendence of all institutions for all persons convicted of felonies. For this purpose, the Legislature may delegate the government, charge and superintendence of such institutions to any public governmental agency or agencies, officers, or board or boards, whether now existing or hereafter created by it. *Any of such agencies, officers, or boards*

shall have such powers, perform such duties and exercise such functions in respect to other reformatory or penal matters, as the Legislature may prescribe." (Italics added.)

The delegation of power contained in the former sections of the Penal Code on this subject (sections 1221 to 1224) was validated by the same section of the Constitution in the following terms: "All existing statutes . . . purporting . . . to so delegate such government, charge and superintendence, to so prescribe such powers, duties or functions . . . are hereby ratified, validated and declared to be legally effective until the Legislature provides otherwise." By moving these provisions from one part of the Penal Code to another, the Legislature did not change their effect. (Penal Code, §10000.)

Even if it is assumed that the power of the superintendent of the state hospital, to whom defendant was deliv-[fol. 53] ered, to determine whether defendant has recovered his reason is a judicial power, the foregoing provisions of the California Constitution authorize the delegation of this power. Under the statutes the prisoner is delivered to the custody of the superintendent as a person convicted of a felony, and thereafter, so far as the superintendent's authority over such a person is concerned the superintendent exercises not only the authority of an officer entrusted with the superintendence of an institution for convicted felons but the duties and functions prescribed in Penal Code Section 3704.

It follows that unless the warden of the prison in which defendant is incarcerated believes that defendant is now insane, no court of this state has jurisdiction to determine the question of his sanity. It has been suggested that this conclusion must be wrong on the ground that if the matter is left to the discretion of the warden, a circular process may begin whereby defendant will again be found insane, again sent to a state hospital, and again declared restored to sanity. It has therefore been suggested that only a judicial determination of this question at this time will prevent such circuity. This suggestion is based on the assumptions that the warden believes that defendant is insane, that a jury would find him to be insane, and that the superintendent of the Mendocino State Hospital was in error—assumptions that this court cannot properly make. Moreover, it does not follow that a judicial deter-

[fol. 54] mination of this question will prevent circuity. If this court were to hold that defendant has a right to a judicial determination of the question of his restoration to sanity under some procedure not specified in Penal Code sections 3700 to 3704, such a determination would be either that defendant is sane or insane. If the verdict is that he is insane, the defendant would have to be delivered to an institution and detained there until in a judicial proceeding he was found sane. If the verdict is that he is sane, the defendant would be delivered to the warden for execution and the date for execution would have to be set again. During the interval between this adjudication and the date for execution, the defendant may again become insane. Unless the warden is to execute an insane person in violation of Penal Code section 1367, it would be the warden's duty, if he had good reason to believe that defendant was insane, to set in motion again the procedure for determining the defendant's sanity. The duty of preventing execution of an insane person is given by statute to the warden and to the Governor, and even if it were held that defendant has a right to a judicial determination of the question of his sanity, the determination that he is [fol. 55] sane at the time finally set for his execution must be made by the warden.

The writ is discharged, and William Jerome Phyle is remanded to custody.

Traynor, J.

We concur: Gibson, C. J.; Shenk, J.; Edmonds, J.; Spence, J.

[fol. 56] DISSENTING OPINION BY SCHAUER, J.

I dissent.

I cannot agree that the privilege of the writ of habeas corpus may be denied to a person solely because he has been convicted of crime, sentenced to death, adjudged insane, and committed to a state hospital; nor can I agree that the powers vested in the warden of a state prison or in the medical superintendent of a state hospital for the insane transcend and abrogate the powers of the courts to entertain proceedings on habeas corpus. It is indisputable, I think, that the powers of the courts on habeas corpus proceedings are sub-

stantially abrogated in cases of this type by the holding of the majority opinion that the factual determination of an administrative agent is absolutely conclusive on the courts in such proceedings.

The real issue here is not what is stated in the majority opinion. It really is more simple and much more grave. On behalf of the prisoner it is alleged in material part "That on the 24th day of December, 1946, after a jury trial in the Superior Court . . ., William Jerome Phyle [the prisoner] [fol. 57] was adjudged insane, and said Superior Court committed said . . . Phyle to the State Hospital at Talmage, to be held there as an insane person, and there kept in a state of confinement *until his reason be restored.* [Italics added.]

"That thereafter, said William Jerome Phyle remained in the Mendocino State Hospital at Talmage, California, until January 18, 1947, at which time the Superintendent of the Mendocino State Hospital presented to the Governor his certificate that the said William Jerome Phyle had recovered his reason, *whereas said Phyle was, and still is, insane.* [Italics added.]

"That thereafter, the Governor of the State of California issued to the Warden [of the state prison] the Governor's warrant, appointing the 2nd day of May, 1947 for the execution by means of lethal gas of William Jerome Phyle. . . .

"That unless this Court restrains Clinton T. Duffy [the warden of the state prison] from carrying out the warrant of the Governor, that said . . . Phyle will be executed on Friday, the 2nd day of May, 1947."

According to the return to the writ, the prisoner had been sentenced to death; thereafter upon proper legal proceedings under Chapter 2, Article 3, Part 3 of the Penal Code, a jury found he was insane and the superior court on December 24, 1946, ordered that he be confined in a state hospital "until his reason be restored"; the superintendent of such hospital on January 18, 1947, certified to the governor that he was [fol. 58] sane; the governor made his warrant of execution; and the warden holds the prisoner pursuant to such sentence and warrant.

The controlling facts shown by the petition and return are that the prisoner was duly adjudged insane and committed by judgment of the superior court to be confined in a state hospital "until his reason be restored"; that his reason has not in fact been restored (that he "was, and still is, insane")

but that, notwithstanding the judgment and his continuing insanity he has been released from the state hospital and the custody of its superintendent and transferred to the state prison and custody of the warden and will be executed while insane unless this court intervenes. It is most important to note that the vital allegation that the prisoner "was, and still is, insane," is not challenged in the return and must be deemed admitted. The majority opinion necessarily holds that this fact, or at least the allegation of it, is wholly immaterial because the superintendent of the hospital has presumptively determined and has certified that the prisoner has recovered his reason; such determination and certification, the majority hold, are conclusive on the prisoner and on this court; hence habeas corpus will be denied. Obviously, the determination of the majority does not rest upon any inquiry or determination *by the court* as to the fact of sanity or insanity of the prisoner; it rests squarely on the holding that the administrative agent has sole and uncontrolled authority to determine and certify the fact of sanity [fol. 59] or insanity and that such fact, when so certified, cannot be disputed by the prisoner or inquired into by the court. This, clearly, is abrogation of the rights and powers of habeas corpus in such a case.

Contrary to the implications of the majority opinion (the order reads, "The writ is discharged, and William Phyle is *remanded to custody*" (italics added)), the petition does not seek *release* of the prisoner; as appears on its face and as is hereinafter shown in detail, it seeks only to have him transferred in custody from an unlawful to a lawful custodian; i.e., from the custody of the warden of the prison to the custody of the superintendent of the state hospital. As is also more particularly shown hereinafter, upon the unchallenged facts alleged the superintendent of the hospital is the sole lawful custodian of the prisoner.

The relief sought may be granted on petition for habeas corpus. Section 1493 of the Penal Code provides that "In cases where any party *is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party*, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto." (Italics added.) Section 1487 of the same code provides that "If it appears on the return of the writ that the prisoner is in custody by

virtue of process from any court of this state, or judge or officer thereof, such prisoner may be discharged [or remanded to proper custody as provided by section 1486] . . . [fol. 60] When the person having the custody of the prisoner is not the person allowed by law to detain him." As previously set forth, the petition alleges facts which indubitably entitle the prisoner to the relief sought if the facts be true. Such facts are that the prisoner has been convicted of crime and sentenced to death; that after such conviction he was duly adjudged insane and committed to the state hospital "to be there confined until his reason be restored"; that he "was, and still is, insane"; that notwithstanding the actual continuance of his insanity the superintendent of the hospital has certified that he is sane and he has been transferred from the custody of the hospital superintendent to the custody of the prison warden and that he will be executed by the prison warden unless this court restrains such action.

From what has been above related it appears that the basic issue here is, is the asserted determination of the medical superintendent that the prisoner is now sane conclusive on the court and on the prisoner in a habeas corpus proceeding wherein it is alleged that the prisoner is in fact insane? In other words, does certification of sanity by the state hospital superintendent preclude the prisoner from alleging and proving and the court from determining that, contrary to the certification, the prisoner is in truth insane? If the answer to these questions is yes, as the majority hold, then the right of habeas corpus is effectively abrogated as to persons in the [fol. 61] status of the prisoner before us.

The holding of the majority opinion that the medical superintendent has exclusive and transcendent powers to determine questions of sanity of prisoners is squarely contrary to earlier holdings of this court. In *Gardner v. Jones* (1899), 126 Cal. 614, we find a case which in material legal principles is identical to that now before us. Dr. A. M. Gardner was then (1899) superintendent of the Napa State Hospital. He applied to this court "for a writ to prohibit defendant [judge of the superior court of Contra Costa county, and the superior court of Napa County] from entertaining jurisdiction in a certain *habeas corpus* case" whereby the Napa County superior court was assuming to determine the question of the restoration to sanity of one

Buchanan, who had been committed to the state hospital as insane. This court said (pages 615-616 of 126 Cal.), "The question is an important one, inasmuch as it involves the right of an inmate of a state hospital, who happens at the time to be resting under a criminal charge and is committed pending trial for his crime, to have his alleged insanity made the subject of judicial inquiry by the writ of *habeas corpus*. It is claimed [exactly as here] that '*the medical superintendent is the only person or tribunal vested by law with authority to determine whether or not an insane patient of this class has recovered.*' . . .

"The provisions of the Penal Code regulating the commitment of persons charged with crime are found in sections [fol. 62] 1367 to 1373. No question arises as to the regularity of Buchanan's commitment under these provisions. Section 1372 provides as follows: 'If the defendant is received into the asylum, he must be detained there until he becomes sane. When he becomes sane, the superintendent must give notice of that fact to the sheriff and district attorney of the county. The sheriff must thereupon, without delay, bring the defendant from the asylum and place him in proper custody until he is brought to trial or judgment, as the case may be, or is legally discharged.'

"Section 1473 of the Penal Code provides as follows: 'Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever may prosecute a writ of *habeas corpus* to inquire into the cause of such imprisonment or restraint.'

"Section 5, article I, of the constitution reads: 'The privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require its suspension.'

"We find in the statute no authority for making two classes of insane—one civil and the other criminal—and by any such classification to take the latter out of the operation of the statute as to the right of *habeas corpus*. Section 13, article III, of the insanity law makes no such distinction. But plaintiff contends that section 14 of article III in terms confers authority upon the medical superintendent to determine when the patient of the criminal class is restored to [fol. 63] sanity, and, as the authority is not conferred upon any other person or tribunal, it is necessarily exclusive, and also proves that the law recognizes the two mentioned

classes of insane. We cannot believe that the legislature intended to enact a law so entirely out of harmony with the spirit and letter of the constitution and the statute to which attention has been called. It is our duty to harmonize sections 13 and 14, article III, of the insanity law, so as to conform to the constitution and to the statutes quoted, if we can, rather than resort to the more extreme necessity of holding section 14 to be unconstitutional, as defendant claims it to be, if given the construction placed upon it by plaintiff. We think it was intended by section 14 to provide means by which a patient of Buchanan's class, whose reason has become restored, could be at once remanded to the sheriff of the proper county for trial; but it was not intended that the arbitrary power should rest with the medical superintendent to deprive the patient of the right to be so returned, *nor was it intended that the medical superintendent should be the exclusive judge of the patient's restoration.* [Italics added.] . . .

"[P. 618] The question of Buchanan's recovery, in our opinion, is jurisdictional and may be examined upon *habeas corpus.* . . .

"[P. 619] Section 1493 [Pen. Code] provides: 'In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of [fol. 64] such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto.' In his petition Buchanan does not ask to be restored to his freedom; he asks to be redelivered to the sheriff of Yuba county. . . . We see no reason why the court or judge should not have the power by an order to direct that Buchanan be redelivered to the sheriff as prayed for. . . ."

In accord with the reasoning above quoted the application of the medical superintendent for the writ of prohibition was denied and thereafter in the habeas corpus proceeding the superior court proceeded to determine the issue as to the defendant's restoration to sanity. *It determined that the defendant-petitioner was still insane and remanded him to the custody of Dr. Gardner.* Thereupon application for habeas corpus was made to this court. Chief Justice Beatty, authoring the opinion of the court, again referred to Dr. Gardner's claim of exclusive jurisdiction, as asserted in his application for prohibition, and declared (*In re Buchanan* (1900), 129 Cal. 330, 332-333), "it was there [in *Gard-*

ner v. *Jones* (1899), *supra*, 126 Cal. 614] contended that the insanity law of 1897 (Stats. 1897 p. 311) has made the superintendent of the asylum the sole and final judge, in a case of this kind, whether the prisoner has become sane, and that the courts no longer have the power to conduct the inquiry by *habeas corpus*, or otherwise. It was held against this contention that *the question of unlawful restraint of the* [fol. 65] *liberty of a citizen is, and must be as long as our present constitution endures, a judicial question to be determined by the courts, and that the statute referred to would be unconstitutional if it required the construction contended for.* [Italics added.] . . . In consequence of this decision the superior judge proceeded with the hearing upon return to the writ of *habeas corpus* issued by him, and having concluded upon the evidence that Buchanan was still insane, made an order remanding him to the custody of Dr. Gardner. Thereupon the present proceeding was commenced in this court, and upon the same evidence submitted to the superior judge, and some additional testimony, *we must now decide the question of fact whether Buchanan has become sane.* [Italics added.]

"The question, however, is not whether he has become sane in every sense of the word, but whether he has become sane in the sense of the statute, which requires a suspension of the proceedings in a criminal cause whenever it is found that the defendant is presently insane. In other words, if there is a difference between the medical view of insanity and the view upon which the statute is founded, the question of sanity or insanity is to be determined with reference to the latter as contra-distinguished from the former view. That there is such a difference is notorious . . ." In the light of that difference the writ was sustained and Buchanan was ordered "returned to the custody of the sheriff of Yuba [fol. 66] county." (Here we have no way of knowing what standard of sanity or insanity the present superintendent of the state hospital applied in certifying that the prisoner is sane.)

Several vices in the majority opinion become apparent from what has been quoted from *Gardner* v. *Jones* (1899), *supra*, 126 Cal. 614, and from *In re Buchanan* (1900) *supra*, 129 Cal. 330. In the first place the majority opinion unconstitutionally denies the protection of habeas corpus, at least as exemplified by a court trial of the issue of fact (if there be one under the pleadings in view of the failure to

deny that the prisoner is presently insane) to this petitioner. Our state Constitution (art. I, §5) declares that "The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require its suspension." Section 9(2) of article I of the United States Constitution makes the same provision. There is in this case no suggestion that there is extant any status of rebellion or invasion whereby to justify suspension of the writ in the public safety. But the majority opinion, in all practical effect, suspends it—even abrogates it altogether—insofar as concerns persons who have been convicted of crime, sentenced to death, and thereafter adjudged insane. If the prisoner's insanity in fact continues, as is specifically alleged and not denied, the law and the judgment of the superior court require that he be continued in the state hospital until his sanity is restored. [fol. 67] As shown hereinabove habeas corpus is a proper remedy. If we refuse him the relief sought, solely on the ground that the medical superintendent's certificate of restoration is conclusive of the fact of sanity, we are necessarily abrogating our power in the premises—our power to determine the fact of insanity. And, furthermore, we are abrogating the right of the prisoner to even challenge, on habeas corpus, one of the facts upon which the legality of his custody and impending execution depend. That is certainly an abrogation of the right of habeas corpus. No authority is cited for holding that a person in the status of this prisoner may be deprived of the rights of habeas corpus.

It is important also to note that section 1367 of the Penal Code provides that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." If this section means anything at all it should mean that it establishes a right which a convicted person, sane or insane, or one who speaks for him, may enforce in the courts. If the courts cannot enforce it, it is a poor right. If the right of habeas corpus is to be denied to such a person it should be by clear constitutional provision, not by court legislation.

It should be observed also that the state may eventually find that the majority holding here is unfortunate. If the statutes in question, as held by the majority, vest absolute, conclusive, and exclusive power in the superintendent of [fol. 68] the state hospital "for the determination of the question of the sanity of a person who has been sentenced

to death," and if it be true, as is also held by the majority, that "a court has no inherent power to determine that question," then, of course, the determination of the superintendent is equally final regardless of whether he determine that the prisoner is sane or insane. In some future case such a superintendent may rule that a prisoner remains insane although other state officers have reason to believe that such prisoner has recovered his sanity. Under the majority holding the fact of recovered sanity would be wholly immaterial; an allegation to that effect, although not denied, would be totally disregarded. Neither the prisoner himself nor the prosecuting officers of the state would be heard to contend that in truth the prisoner had recovered his reason. Only the certificate of the superintendent, based on any standard of sanity (medical or legal) which he might elect to use, could determine that fact; his discretion in any event would be wholly uncontrolled and if he refused to give the certificate the courts of this state would be powerless to intervene.

The majority opinion devotes much space to a discussion of the duties and powers of the hospital superintendent and to those of the prison warden and suggests that the warden, if so disposed, can again initiate proceedings for another jury trial on the issue of the prisoner's present sanity status. But such speculation is scarcely germane to the [fol. 69] issue before us. The duties of the warden are one thing; our duties on habeas corpus are quite another. The petition alleges that "unless this Court restrains Clinton T. Duffy [the prison warden] from carrying out the warrant of the Governor, that said . . . [prisoner] will be executed on Friday, the 2nd day of May, 1947." The fact that the writ prayed for originally issued and that in consequence the date of execution has been postponed until this cause is finally decided, does not mean that the jeopardy of the prisoner is lessened. The allegation, coupled with the other averments above quoted, still unmistakably means that the prisoner, although presently insane, will be executed under the warrant which has been issued unless we rule otherwise. Whether that allegation be true, the majority hold, we will not inquire because we have no power in any event to prevent the execution. I cannot subscribe to such a doctrine.

Failure to espouse such doctrine does not mean that any statute in question is made meaningless. The provisions of

Penal Code section 3704 that "When the defendant recovers his reason the superintendent of such [state] hospital must certify that fact to the Governor" and that the defendant may then be returned to prison and executed, like the provisions of section 1372, hereinabove cited and discussed in the quotation from the Gardner case, may be given effect and applied in all proper cases. Under the language of that section (§ 3704) it may well be that a superintendent of a state hospital has implied authority to make a prima facie determination that a prisoner has recovered (or not re- [fols. 70-71] covered) his sanity and to certify him back to the warden of the state prison for execution. But this does not mean that the prisoner must be denied habeas corpus, or an examination and determination *by the court* upon habeas corpus, of the fact, if it be alleged, that the prisoner is in fact insane (or sane) although the superintendent may have determined and certified that he is sane (or insane).

The history of habeas corpus, the great care with which the rights of all persons to invoke that remedy have been guarded by provisions of our national and state constitutions and the jealous solicitude with which the courts have heretofore protected those rights, all combine to forbid the holding which the prosecuting officers of this state now espouse and which the majority make.

The state, if it requests such relief, should be given opportunity to challenge the now admitted averment that the prisoner "still is" insane; that issue should then be tried out before a referee; and our order should depend on *our* determination of the fact, not on subservience to an asserted "conclusive" determination of an administrative agent. Thus may the right of habeas corpus be preserved, the court maintain its jurisdiction, and justice still run its full course.

Schauer, J.

I concur. Carter, J.

[fol. 72] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR REHEARING—Filed November 25, 1947

Your petitioner respectfully petitions for rehearing on behalf of William Jerome Phyle on the ground that the statute inherently, and as now construed and applied by the Court in the decision is contrary to the Constitution of the

United States and a rehearing should be granted to construe and apply the statute constitutionally.

Sections 3700 to Section 3704 of the Penal Code of the State of California, inherently, and as construed and applied in this case by the Court, are in violation of the Fourteenth Amendment to the Constitution of the United States as now construed by the California Court in the following respects:

I

Section 3704 of the Penal Code of the State of California, as now construed and applied in this case, is in violation of [fol. 73] due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that it provides for the restoration of sanity and the execution of a sentence of death without notice or an opportunity to be heard, the first essentials of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The statute inherently, and as construed and applied in this case, provides for no hearing of a question of restoration of sanity, no opportunity to be represented or heard by counsel in such proceeding, and no processes of Court. The California Court in its decision and determination erred in construing such a statute to be constitutional under the Fourteenth Amendment to the United States Constitution.

II

Section 3704 of the Penal Code, as construed and applied in this case, denies William Jerome Phyle the right of counsel guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III

Section 3704 of the Penal Code of the State of California inherently, and as construed and applied in this case, violates the due process clause of the Fourteenth Amendment to the Constitution of the United States in that it allows a single person, neither a judge nor a judicial officer, to pronounce a death sentence by a finding of sanity without any hearing thereof.

[fol. 74]

IV

Section 3704 of the Penal Code of the State of California denies due process of law guaranteed by the Fourteenth

Amendment to the Constitution of the United States in that it permits a doctor to set aside a solemn judicial verdict in a judgment adjudicating William Jerome Phyle to be insane.

V

Section 3704 of the Penal Code of the State of California is in violation of the Fourteenth Amendment to the Constitution of the United States in that it is vague, indefinite and uncertain in its procedure to determine "when the defendant recovers his sanity."

The decision of this Court, denying a judicial hearing on a proceeding setting aside the judgment of a jury in Marin County finding Phyle insane, is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

VI

Article 1, Section 5 of the Constitution of the State of California inherently, and as construed and applied in this case, to Section 3704 of the Penal Code of the State of California, is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States in that it is construed to deny habeas corpus proceedings in a court to the decision of a doctor finding a man sane by which he is sent to his death eighteen days after a jury had found him to [fol. 75] be insane. It is not denied in the petition for the writ of habeas corpus that Phyle is still insane, and no denial is made in any return to the writ.

VII

The defendant, William Jerome Phyle, is being denied due process of law, equal protection of law, and privileges and immunities guaranteed the citizens of the United States in these respects:

(a) Although he has been adjudged insane by jury, he is about to be executed without further trial, notice and hearing, or any other proceeding in which he is duly represented by counsel of his own choice, and the processes of the Court are given to him and evidence is presented in his behalf. A denial of each of these fundamental rights is a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(b) The decision of the Court makes an administrative doctor the sole dictator of Phyle's death, and nullifies previous Court judgments. In this, the procedure and proceedings are unfair and unequal, and deny the defendant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. They also constitute cruel and inhuman punishment of an insane person in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The decision of this Court overrules the previous holdings of the Court entitling a person to a Court review of an [fol. 76] administrative agency or officer, and particularly overrules the holding of this court in Laisne v. the State Board of Optometry, and therefore, in violation of the Fourteenth Amendment.

VIII

The decision vests the administrative doctor with powers to nullify a judicial act, and therefore violates Article 6, Section 1 of the Constitution of the State of California.

IX

The decision suspends the right of judicial review of the act of an administrator and suspends the right of habeas corpus on a fundamental question involving life, and therefore violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

X

The Legislature was without authority to delegate the power to nullify the judgment of the Court through administrative agency, a doctor . . . and such delegation renders Section 3704 of the Penal Code of the State of California unconstitutional and in violation of Article 6, Section 1 of the California Constitution, and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

XI

The holding of the Supreme Court of California, which in effect is that there is no constitutional right of an insane person not to be executed, is in itself in violation of the due process clause, the equal protections clause, and the

[fol. 77] privileges and immunities clause of the Fourteenth Amendment to the Constitution of the United States. It is also cruel and unusual punishment in violation of the Fourteenth Amendment to the Constitution of the United States to execute an insane person.

The statute of California, to-wit: Section 3704 of the Penal Code, as now construed and applied by this Court, is in violation of the Fourteenth Amendment to the Constitution of the United States in that it would permit the execution of an insane person without notice, trial or hearing, and such execution of such insane person constitutes cruel and inhuman punishment forbidden by the Fourteenth Amendment to the Constitution of the United States.

XII

Section 3704 of the Penal Code, as now construed and applied by the Supreme Court of California, is special, partial and arbitrary in that it permits an arbitrary action by the doctor and is thus in violation of the Fourteenth Amendment to the Constitution of the United States.

For each and all of the grounds above set forth, the decision of the Supreme Court of the State of California should be set aside and a rehearing granted on each of the Federal grounds urged herein.

The petitioner, on behalf of the defendant, an insane person, challenges the decision, inherently and as construed and applied in this case, on all the grounds specified under [fol. 78] the Constitu-ion of the United States, and asks this Court specifically to p ss upon each and all the grounds under the Constitution of the United States in that:

(1) The statute inherently and as construed and applied in this case, permits an administrator to set aside a solemn judicial decree;

(2) It permits the execution of an insane person without notice, without hearing, without being represented by counsel; and without judicial processes on the question of restoration of sanity;

(3) It permits the execution under a statute which is special, partial and arbitrary in violation of the Fourteenth Amendment, and

(4) The statute as construed and applied permits the execution of an insane person, which is cruel and inhuman

punishment forbidden by the Fourteenth Amendment to the Constitution of the United States, and furthermore upon each and all of the other grounds and provisions set forth above, this Court is asked to review the challenges hereinabove set forth on each and all of the grounds specified above as violations of the defendant's rights to due process and his privileges and immunities and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

Morris Lavine, Al Matthews ml, Wallace S. Myers,
Attorneys for Petitioner and the Insane Defendant.

[fol. 79] ARGUMENT ON BEHALF OF THE PETITION FOR REHEARING

To the Honorable, the Justices of the Supreme Court of the State of California:

We have presented several grounds for rehearing under the Federal Constitution. The argument upon these questions will be consolidated and presented herewith:

The Supreme Court of California erred in its opinion in holding that an insane person could be executed on the order of a single doctor—without notice or hearing or without evidence or without being represented by counsel. This holding is contrary to due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States.

These proceedings now approved by the Supreme Court of California resemble more the actions of dictatorships as they existed in Germany, Italy and Russia during the war. There, that is, in Germany, a single doctor, by a single decree, declared that a man was insane and sent him to his death. In the present proceedings, a doctor by a single decree declared the man sane and sentenced him to his death. Both are products of a single dictator—the thing we fought against in a great war. This Court relies on a Georgia Statute, and a case decided by the Supreme Court of the United States, to-wit: Nobles vs. Georgia, 168 U. S. 398 at page 404 in support of the position that the Court takes in the majority opinion. A careful analysis of that case, however, supports not the Court's contention,

but our contention. In that case, a Georgia statute pro-
[fol. 80] vided for the determination of insanity on the suggestion of a person after conviction of crime. The statute also provides further:

> "and at any time thereafter, when it shall appear *to the said presiding Judge*, either by inquisition or otherwise, that the said convict is of sound mind, the said Judge shall issue a new warrant, directing the Sheriff to do execution of said sentence."

Thus it is apparent that before the *judicial* determination can be set aside that a *presiding Judge* must *by inquisition or otherwise* determine *judicially* that the said proceedings be set aside.

This is quite different from the proceedings provided by the California statute and the California decision that a *doctor* and administrative officer, without taking any testimony *by inquisition or otherwise* can set aside the *solemn judicial determination of a Court*, which tried the issue and a judicial determination by a jury that the defendant is insane.

Furthermore, the decision of the Supreme Court of the United States referred to, comments on the fact that there was adequate administrative and quasi-judicial process for the purpose of investigating the question of insanity.

That case dealt with a statute providing for the determination of insanity, not for the determination of the restoration of sanity. Furthermore, that statute was like our own Section 3700 of the Penal Code, which provides for the determination of insanity. It is apparent that ade-
[fol. 81] quate safeguards are provided in this State for the determination of insanity. The Court has now stretched the statutes to provide for inadequate determination of the restoration of sanity. No case is cited by the majority of the Supreme Court, and we believe none can be found that holds that the restoration of sanity may be determined by an administrative officer without notice, without hearing and without representation of counsel. None of the cases referred to by the Court in 49 ALR 804, wherein are summed up various cases, referring to the determination of insanity hold that a person may be found insane without notice, or hearing or without adequate administrative or judicial processes of some kind or other for the purposes of an adequate hearing on the question of insanity.

In our own State, such proceedings have been held to be unconstitutional where they fail to provide for adequate judicial determination of the issue of insanity. See In re Lambert, 134 Cal. 626 (66 Pac. 851).

Petitioner William Jerome Phyle was given a hearing in accordance with Section 3700 et seq. of the Penal Code on the question of his insanity. He was tried by a jury, and a judicial judgment was entered declaring him to be legally insane. In that proceeding he was afforded due process. He was permitted the processes of the Court; he was given notice and an opportunity to be heard. But when the proceedings were had before the doctor of the State Hospital, no such hearing was had. He was not represented by counsel, he did not have the opportunity [fol. 82] to produce any evidence, nor was he in a mental condition to produce any evidence because he was then insane, and there has been no denial of the petition for the writ that his insanity still continues. Yet, a proceeding is being permitted, according to the Court's decision, wherein Phyle, although insane and not competent to handle his own defense, and not represented by counsel, was declared sane by the doctor and on this declaration alone, is being sent to his doom.

A defendant in a criminal proceeding is entitled to be represented by counsel at every stage of the proceedings, and is entitled to notice and a hearing, the first essentials of due process of law, or he is denied due process of law.

Powell v. Alabama, 287 U. S. 451, 77 L. Ed. 158.

In the case of In Re Lambert, 134 Cal. 626 (66 Pac. 851), the Court said:

> ". . . the statute which enabled a person to be declared insane on the certificate of two medical examiners, is void as depriving a person of his liberty without due process of law in not giving the alleged insane person notice and opportunity to be heard."

If such a statute is in violation of due process of law in not giving the alleged insane person notice and an opportunity to be heard on the question of his insanity, it is equally void as depriving a person of his liberty in not giving

him an opportunity to be heard on the question of his restoration to sanity. The Court in the Lambert case said:

> [fol. 83] "The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may be by its authority be done."

An order for the return of the defendant, Phyle, to the State Prison for execution is essentially a judgment by which the defendant is to be deprived of his rights, and it is a cardinal principle in English jurisprudence that before any judgment can be pronounced against a person, there must have been a trial of the issue from which the judgment is given. A proceeding where there is no hearing at which the attorney is present or represented by any person, or an attorney of his choice, is in violation of due process of law. See in 1 Re Lambert, 134 Cal. 626. For the summary of cases on the right of an insane person to due process of law, to notice and a hearing, see State vs. Billings, 43 Amer. State Reports 539, where it is said:

> "Persons, though insane, are still human beings" and laws regarding them are "the vast difference between a civilized people and a savage nation."

The right to counsel is guaranteed to a person charged with crime at every stage of the proceedings. See the following cases:

> Powell vs. Alabama, 287 U. S. 45 (77 Law Edition 158);
> White vs. Regan, 324 U. S. 760;
> Rice vs. Olson, 324 U. S. 786;
> House vs. Mayo, 324 U. S. 42.

The rights involved here are fundamental rights protected by the Fourteenth Amendment to the Constitution of the United States. The right to habeas corpus proceed-
[fol. 84] ings to protect those fundamental rights is guaranteed by the Constitution of the United States.

> Mooney vs. Hallahan, 294 U. S. 103;
> Smith vs. O'Grady, 312 U. S. 329;
> Woods vs. Niersgheimer, 328 U. S. 211;
> Ex Parte Hawk, 321 U. S. 114.

The denial to an accused of the right to habeas corpus denies him a right guaranteed by the Federal Constitution. The decision of this Court overrules decisions that hold that an adr inistrative agency may not overrule a judicial decision of a court, and overrules the previous holding of this Court in Laisne vs. State Board of Optometry. See the following cases:

Laisne vs. State Board of Optometry, 19 Cal. 2nd 831 (133 Pac. 2nd 451);
Rummy vs. State Board of Funeral Directors, 13 Cal. 2nd 85 (87 Pac. 2nd 848);
McDonough vs. Goodcell, 13 Cal. 2nd 752;
St. Joseph's Stockard Co. vs. U. S. 298 U. S. 38 (80 Law Ed. 1033);
Ohio Water Co. vs. Ben avon Borough, 253 U. S. 287 (64 Law Ed. 908);
Crowell vs. Benson, 285 U. S. 22 (76 Law Ed. 598).

In the case of Laisne vs. State Board of Optometry, not only the majority opinion but the minority opinion holds that there must be substantial evidence before the administrative agency. No evidence was taken before the doctor. Therefore, both according to the majority opinion and according to the minority opinion, since there was no evidence taken, the determination of the doctor, administrative agency, is of no force or effect.

Judicial questions must be determined by a Court, as in the Georgia statute referred to in Nobles vs. Georgia, [fol. 85] 168 U. S. 398, 404, not by a doctor at a hospital. The value of the opinion of the doctor may determine in this proceeding just the same as it should be determined in any other habeas corpus proceeding by the finder, of the fact, the judge, not the doctor. Here, the power is vested solely in the doctor, and not a court, and a doctor is thus empowered to nullify the solemn judgment of a court and the finding of 12 jurors on an issue of fact. The statute does not give the doctor that power, but this Court has given it to him in its opinion. The statute says:

"When he becomes sane" and further provides "when the defendant recovers his reason the Superintendent must certify that fact."

This contemplates a judicial determination of the fact of recovery of reason. A doctor may testify to that fact in a judicial proceeding, the habeas corpus proceeding, but until the court itself has determined that fact from all the evidence before it, then . . . judicial determination has been nullified by a single person whose views may or may not be ultimately accepted by a court as the true finding of fact. Such a procedure or proceeding we respectfully submit, violates due process of law.

The Court erred in its opinion that the statute, as construed by this Court, is not in violation of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and in holding that the statute is not special, partial and arbitrary.

[fol. 86] We can think of no more arbitrary statute than Section 3704 of the Penal Code, which permi-s a doctor—without evidence—and arbitrarily, to declare a man sane—without trial, without hearing.

This overrules the previous holdings of this Court in Laisne vs. State Board of Optometry, in which an administrative agency, after the taking of evidence nevertheless was subject to judicial review of its acts. This is in accord with the holdings of the Supreme Court of the United States.

Even the minority opinion in that case argued its contentions on the basis of evidence having been presented to the administrative agency.

No case in this State in either majority or minority opinion goes so far as to hold—as does the opinion in the instant case—that the administrative agency—without evidence, can arbitrarily decide a question and not be subject to the review of the courts.

In Walker vs. City of San Gabriel (20 Cal. 2nd 879), this Court set aside the order of a city council which was based solely on *hearsay* evidence. In the present case there was *no* evidence.

The pleadings aver that Phyle is still insane. This is not controverted or contested by the return. Hence, it must be taken as true. The same Penal Code which attempts to give the doctor power to decree the death of an insane [fol. 87] person declares in another section that no insane person shall be executed.

Therefore, an attempt to carry out the doctor's decree is in excess of jurisdiction and should be subject to judicial review by the great writ of habeas corpus.

The decision of this Court as now construed and applied in this case permits cruel and unusual punishment in violation of the Fourteenth Amendment to the Constitution of the United States. In the various decisions and in the note in 49 ALR referred to by the Court, the comment is made that the law out of humanity forbids the execution of an insane person. This Court has now decreed that such humanity does not apply in the State of California, and that an insane person may now be executed without offending due process of law. We challenge that holding as in violation of the Fourteenth Amendment to the Constitution of the United States and ask this Court to rehear the case on this ground. Equally with the Supreme Court of the United States, this court is charged with the duty of passing upon a Federal question as to whether such holding is in violation of the Fourteenth Amendment to the Constitution of the United States. Mooney vs. Holohan, 294 U. S. 103.

Cruel and unusual punishment, or punishments of a barbarous character unknown to the common law, being such as disgrace the civilization of former ages and made one shudder with horror to read of them. In Re O'Shea, 11 Cal. [fols. 88-89] App. 568, 105, Pac. 776. Blackstone says that the execution of an insane person is forbidden at common law. See Blackstone's Commentaries, 24, 25. It would therefore seem that the execution of an insane person is cruel and inhuman punishment forbidden at common law and therefore forbidden under the Fourteenth Amendment to the Constitution of the United States.

Wherefore, William Jerome Phyle prays that this Honorable Court grant a rehearing of the questions herein involved, and that the previous judgment and order and determination may be satisfied and reversed, and the defendant granted the writ as prayed for.

Respectfully submitted, Morris Lavine, Al Matthews, ml, Wallace S. Myers, Attorneys for the Petitioner and the Insane Defendant.

[fols. 90-97] Order Due December 10, 1947

Cr. No. 4797

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

In Re PHYLE on Habeas Corpus

ORDER DENYING REHEARING—Filed December 8, 1947

Petition for rehearing denied.
Carter, J. and Schauer, J. voting for a rehearing.
Dated: Dec. 8, 1947.

Gibson, Chief Justice.

[File endorsement omitted.]

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 99] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1947

No. 395, Misc.

WILLIAM JEROME PHYLE, Petitioner,

vs.

CLINTON T. DUFFY, Warden of the State Prison at San Quentin, State of California

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, GRANTING PETITION FOR WRIT OF CERTIORARI AND STAYING EXECUTION OF SENTENCE OF DEATH—March 8, 1948

On petition for writ of Certiorari to the Supreme Court of the State of California.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that

the petition for writ of certiorari be, and the same is hereby, granted and the case is transferred to the appellate docket as No. 655, October Term, 1947.

It is further ordered that execution of the sentence of death imposed on petitioner by the Superior Court, San Diego County, be, and it is hereby, stayed pending the final disposition of the case by this Court.

March 8, 1948.

(5240)

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Petition not printed

No, 655

WILLIAM JEROME PHYLE,

Petitioner,

vs.

CLINTON T. DUFFY, WARDEN OF THE STATE PRISON AT SAN QUENTIN, STATE OF CALIFORNIA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S OPENING BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 655

WILLIAM JEROME PHYLE,

Petitioner,

vs.

CLINTON T. DUFFY, WARDEN OF THE STATE PRISON AT SAN QUENTIN, STATE OF CALIFORNIA,

Respondent

OPENING BRIEF

Opinion Below

30 Adv. Cal. Reports, p. 843; 186 Pac. (2d) 134.

The decision of the Supreme Court of the State of California discharging the writ of habeas corpus was rendered November 10, 1947. Petition for rehearing was filed in said Court on December 8, 1947. Rehearing was denied December 10, 1947, Justices Jesse Carter and B. Ray Schauer voting for a rehearing. Petition for certiorari was filed in the Supreme Court of the United States on or about March 1, 1948, and certiorari was granted on March 8, 1948.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, section 344, U. S. C. and the Fourteenth Amendment to the Constitution of the United States.

Title 28, section 344, U. S. C., provides as follows:

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

Statutes Involved

"No judge, court or officer, other than the governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken."

(Section 3700, Penal Code of the State of California.)

"If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose

duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of twelve persons to hear such inquiry."

(Section 3701, Penal Code of the State of California.)

"The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court."

(Section 3702, Penal Code of the State of California.)

"The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a State hospital for the insane, and there kept in safe confinement until his reason is restored."

(Section 3703, Penal Code [redacted] the State of California.)

"If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent of such hospital mu certify that fact to the Governor, who must thereupon issue to the warden his warrant

appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment."

(Section 3704, Penal Code of the State of California.)

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person, within its jurisdiction the equal protection of the laws."

(Section 1, Fourteenth Amendment to the Constitution of the United States.)

Statement of the Case

William Jerome Phyle was adjudged insane in a trial by jury in Marin County, California. He was at the time of this trial a prisoner at the State Prison at San Quentin, California, under sentence of death. The warden of the State prison had declared a doubt as to his sanity and had requested a jury trial, which was granted, and it was in this trial that Phyle was adjudicated insane. He was thereafter removed to the State Hospital for the Insane at Mendocino, California. Under California laws an insane person cannot be executed. Eighteen days after Phyle was removed to the State Hospital, the superintendent of this hospital sent him back with a declaration of restoration to sanity. This return to the State Prison and this declaration by the lone superintendent of the hospital meant in effect a new death sentence for Phyle, the execution date being thereafter set for March 12, 1948.

As there had been no trial or court proceeding, or judi-

cial inquiry of any kind or character to determine whether Phyle's sanity was actually restored, Al Matthews, an attorney for the petitioner Phyle, filed a petition for a writ of habeas corpus in his behalf in the Supreme Court of the State of California to test by court action, with a court hearing and with counsel, and a full review, whether or not Phyle's sanity had been restored, or whether he was still insane and whether California's statutes and procedure, permitting a single administrative officer to overrule the determination of a judicial body and a jury, and decree the death of a man whom a jury had just eighteen days before that time pronounced insane, and to determine whether section 3704 of the Penal Code of the State of California, purporting to give that power to a single administrative officer, without the possibility of judicial review, was lacking in due process of law as to violate the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of California (two justices dissenting) held that Phyle was not entitled to a court proceeding or procedure and to a writ of habeas corpus, and was not entitled to a court hearing on the question of the restoration of his sanity and on the determination of whether he was still insane, and whether an insane person could be executed, and that the procedure set out by section 3704 of the Penal Code of California, which denies a court hearing and counsel to a man, whom the habeas corpus petition alleges is still insane, is not proscribed by the due process clause of the Fourteenth Amendment to the Constitution of the United States and is not cruel and unusual punishment as forbidden by the Eighth Amendment to the Constitution of the United States, inherent in and a part of the Fourteenth Amendment to the Constitution of the United States.

The prisoner Phyle had no court procedure, no counsel

or friend to represent him, no processes of court, and no doctors or witnesses to testify in his behalf or any friend or representative to aid him on whether his sanity was "restored eighteen days after a jury and a court had adjudicated him insane."

It is respectfully contended that such procedure and proceedings are so utterly lacking in due process of law as is forbidden by the Fourteenth Amendment to the Constitution of the United States, and that to execute an insane man would be cruel and unusual punishment forbidden by the Eighth Amendment to the Constitution of the United States inherent in the Fourteenth Amendment.

Section 3704 of the California Penal Code provides as follows:

> ". . . if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment."

Pursuant to the individual superintendent's certificate petitioner Phyle was taken back to San Quentin for the purpose of being executed. Attorney Al Matthews, who was representing petitioner, then filed a petition for a writ of habeas corpus challenging the constitutionality and validity of the State Statute above quoted, by which a jury in a full and fair trial adjudicated the defendant insane and then the superintendent of the hospital eighteen days after-

wards, without trial, sends the defendant back to be executed.

The petition for the writ of habeas corpus alleged that Phyle is insane and this allegation in the petition was never controverted.

Therefore, the issue involves whether an insane person may be executed without trial or hearing merely on the certificate of a superintendent of a hospital and with no legal redress or proceeding entitling him to the benefit of counsel or to a full hearing in a court before he is to be executed, or to a writ of habeas corpus.

The Supreme Court of California discharged the writ of habeas corpus and remanded petitioner to the custody of the warden for execution, holding that there was no power in the court to investigate or determine whether petitioner is now sane.

The California court holds that even though the defendant was found to be insane, it was not necessary for the court to determine that he was sane or have any legal proceedings to be afforded to a person found insane in order to safeguard his fundamental and constitutional rights. Two justices of the state Supreme Court dissented (30 A. C. 856-865).

The question, therefore, is whether section 3704 of the Penal Code of the State of California inherently and as construed and applied in this case is in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and involves the construction not only of a statute, but of procedural due process involving an insane person and his right

(1) to counsel;

(2) to a court hearing and to be fully protected to determine whether he has recovered his reason, or whether an insane person is to be put to death without

notice, without an opportunity to be heard and without counsel.

The issues were raised before the Supreme Court of California in the petition for writ of habeas corpus and were determined by that Court adversely to the rights of petitioner guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In the petition for rehearing before the Supreme Court of California, the petitioner's rights were again reasserted as being violative under the Fourteenth Amendment to the Constitution of the United States.

Justice Schauer in his dissenting opinion, (30 A. C. 843, at page 859), states:

"From what has been above related it appears that the basic issue here is, is the asserted determination of the medical superintendent that the prisoner is now sane conclusive on the court and on the prisoner in a habeas corpus proceeding wherein it is alleged that the prisoner is in fact insane? In other words, does certification of sanity by a state hospital superintendent preclude the prisoner from alleging and proving and the court from determining that, contrary to the certification, the prisoner is in truth insane? If the answer to these questions is yes, as the majority hold, then the right of habeas corpus is effectively abrogated as to persons in the status of the prisoner before us.

"The holding of the majority opinion that the medical superintendent has exclusive and transcendent powers to determine questions of sanity of prisoners is squarely contrary to earlier holdings of this court. In *Gardner* v. *Jones* (1899), 126 Cal. 614 (59 P. 126), we find a case which in material legal principles is identical to that now before us. Dr. A. M. Gardner was then (1899) superintendent of the Napa State Hospital. He applied to this court for a writ to prohibit defendant (judge of the Superior court of Contra Costa County, and the superior court of Napa County)

from entertaining jurisdiction in a certain habeas corpus case' whereby the Napa County Superior Court was assuming to determine the question of the restoration to sanity of one Buchanan, who had been committed to the state hospital as insane. This Court said (pages 615-616 of 126 Cal.), 'The question is an important one, inasmuch as it involves the right of an inmate of a state hospital, who happens at the time to be resting under a criminal charge and is committed pending trial of his crime, to have his alleged insanity made the subject of judicial inquiry by the writ of *habeas corpus*. It is claimed (exactly as here) that '*the medical superintendent is the only person or tribunal vested by law with authority to determine whether or not an insane patient of this class has recovered.*'" At page 865 Judge Schauer states:

"The history of habeas corpus, the great care with which the rights of all persons to invoke that remedy have been guarded by provisions of our national and state constitutions and the jealous solicitude with which the courts have heretofore protected those rights, all combine to forbid the holding which the prosecuting officers of this state now espouse and which the majority make.

"The State, if it requests such relief, should be given opportunity to challenge the now admitted averment that the prisoner 'still is' insane; that issue should then be tried out before a referee; and our order should depend on *our* determination of the fact, not on subservience to an asserted 'conclusive' determination of an administrative agent. Thus may the right of habeas corpus be preserved, the court maintain its jurisdiction, and justice still run its full course."

Specification of Errors

The petitioner specifies all of the errors assigned and all of the questions presented, which are as follows:

(1) Whether a State statute inherently and as construed and applied in this case is unconstitutional and

in violation of the Fourteenth Amendment of the Constitution of the United States, where it provides no notice or an opportunity to be heard, with counsel of one's choice on the question of restoration of sanity, the result of which means the execution of the person so involved.

(2) Whether such a statute offends procedural due process of law and is offensive to the fundamental principles of justice which inhere in our institutions.

(3) Whether a person declared insane by a finding of a court and jury can be declared sane by a single superintendent of a hospital without affording a subsequent judicial review of such finding.

(4) Whether the execution of an insane person is so abhorrent to our principles of justice to offend due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

(5) Whether the execution of a person on the single statement of a superintendent of hospitals, without an opportunity for judicial review, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

(6) Whether the ordering of the execution of an insane person, without notice, without opportunity to be heard, without judicial review, and without counsel of his choice or of his friends or relatives with an opportunity for judicial review, is so lacking in fundamental fairness as to violate both due process of law and to constitute cruel and unusual punishment inherent in the Fourteenth Amendment by reason of its presence in the Eighth Amendment to the Constitution of the United States.

Summary of the Argument

I.

SECTION 3704 OF THE PENAL CODE OF THE STATE OF CALIFORNIA INHERENTLY AND AS CONSTRUED AND APPLIED IN THIS CASE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHERE IT PROVIDES NO NOTICE OR AN OPPORTUNITY TO BE HEARD, WITH COUNSEL OF ONE'S CHOICE, ON THE RESTORATION OF ONE'S SANITY, THE RESULT OF WHICH MEANS THE EXECUTION OF THE PETITIONER HEREIN.

II

PROCEDURAL DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS VIOLATIVE BY A PROCEDURE AND PROCEEDING UNDER A STATUTE WHICH PERMITS A PERSON HERETOFORE FOUND INSANE BY A JURY TO BE DECLARED SANE BY A SINGLE SUPERINTENDENT OF A HOSPITAL WITHOUT AFFORDING SUBSEQUENT JUDICIAL REVIEW OF SUCH FINDING.

III

THE EXECUTION OF AN INSANE PERSON IS SO ABHORRENT TO PRINCIPLES OF JUSTICE AS TO OFFEND DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND NO STATE SHOULD CARRY OUT SUCH AN EXECUTION WITHOUT A LEGAL DETERMINATION THAT THE PERSON ABOUT TO BE EXECUTED IS NOT INSANE.

IV

THE EXECUTION OF A PERSON ON THE SINGLE STATEMENT OF A SUPERINTENDENT OF HOSPITAL AFTER SUCH EXECUTION HAS BEEN HALTED BY THE VERDICT OF A JURY THAT SUCH PERSON IS INSANE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

V

THE ORDERING OF THE EXECUTION OF AN INSANE PERSON, WITHOUT NOTICE, WITHOUT OPPORTUNITY TO BE HEARD, WITHOUT JUDICIAL REVIEW, AND WITHOUT COUNSEL OF HIS CHOICE OR OF HIS FRIENDS OR REPRESENTATIVES TO HAVE AN OPPORTUNITY FOR JUDICIAL REVIEW, IS SO LACKING IN FUNDAMENTAL FAIRNESS AS TO VIOLATE BOTH DUE PROCESS OF LAW AND TO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT INHERENT IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY REASON OF ITS PRESENCE IN THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

I

Section 3704 of the Penal Code of the State of California inherently and as construed and applied in this case is in violation of the Fourteenth Amendment to the Constitution of the United States where it provides no notice or an opportunity to be heard, with counsel of one's choice, on the restoration of one's sanity, the result of which means the execution of the petitioner herein.

II

Procedural due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is violative by a procedure and proceeding under a statute which permits a person heretofore found insane by a jury to be declared sane by a single superintendent of a hospital without affording subsequent judicial review of such finding.

The petitioner was adjudicated to be insane after trial by jury in Marin County, California. Such adjudication by a court and jury halted his execution, according to California statutes relating thereto, but a single doctor, the superintendant of a State Hospital, certified eighteen days

thereafter that petitioner was sane. This certification was had without any judicial review. Petitioner Phyle's attorney then petitioned the Supreme Court of California for a writ of *habeas corpus*. The petition alleged that Phyle was still insane. The California Court said that Phyle was not entitled to a judicial review on the restoration of his sanity, and that even though the petition for a writ of *habeas corpus* alleged that he was insane, and this was not controverted except by the superintendent of the State Hospital, he could not have a judicial review or determination of those facts. These proceedings were taken without any counsel being present, without any opportunity to be heard with witnesses, or without any manner or means of nullifying the action of the single superintendent of the hospital. The procedure thus given its approval by California represents more the procedure of dictator countries, like Germany during the war, where a single doctor could doom any person.

This Court has always held that a State must afford procedural due process of law through its Courts, must afford notice and an opportunity to be heard, and this strikes at the fundamental fairness always preserved by this Court.

In the famous *Mooney* case, (*Mooney* v. *Holohan*), 294 U. S. 103, 79 L. Ed. 791, this Court held that the great Writ of Habeas Corpus was available even twenty years after a conviction had been affirmed and time served in prison, to test whether the trial was based upon perjured testimony known to the State, and that habeas corpus was available to test the fundamental fairness of the proceeding.

This Court again held that habeas corpus was available in the case of a prisoner who had pleaded guilty under a promise which was not kept. *Smith* v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859.

Habeas Corpus was held to be available to test the fundamental fairness of a proceeding before an Immigration

Commissioner. There, as here, the determination was made by an administrative officer, but this Court said that a court review must be had where the test involved the correctness of the proceeding.

Ng Fung Ho v. *White*, 259 U. S. 276, 66 L. Ed. 938.
See, also, *House* v. *Mayo*, 324 U. S. 42, 89 L. Ed. 739;
Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572;
Avery v. *Alabama*, 308 U. S. 443, 84 L. Ed. 377;
White v. *Ragan*, 324 U. S. 760, 89 L. Ed. 1348.

The right to counsel, the right to be fully heard through counsel of one's choice, and with all the protection and safeguards of a court or proceedings which give the defendant the right to be adjudicated fully and fairly, are essential to due process of law.

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158.

If a person who is well educated, who might even be a lawyer, has the right to have counsel of his choice and needs it to protect himself, how much more so a person who has been adjudicated insane and who may not know or understand the nature and consequences of his act?

In *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, this Court held that even a well educated person might make many missteps if he is not represented by counsel, and in many cases this Court has said that counsel, to protect one accused of crime, is one of the fundamental safeguards in our system of due process. The State of California deemed that this was not the right of petitioner.

In an earlier case in the State of California, *In re Lambert*, 134 Cal. 626, it was held that a law which failed to require notice to a person and an opportunity to be heard on whether he was to be declared insane on a certificate of two medical doctors, is void as depriving a person of his liberty without due process of law, in not giving such per-

son an opportunity to be heard. Equally true is the situation where a person has been found insane and there is to be a determination of his restoration to sanity, which might spell his death.

In *State* v. *Billings,* 43 Amer. State Reports 539, it is said:

> "Persons, though insane, are still human beings, and laws regarding them are 'the vast difference between a civilized people and a savage nation.'"

As said in *In Re Lambert, supra,* regarding a law declaring a person insane:

> "The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may by its authority be done."

An order for the return of petitioner Phyle to the State prison at San Quentin, California, for execution, after a jury has found him insane and not subject to execution, is essentially a judgment by which the defendant is deprived of his life. It is a cardinal principle in English jurisprudence that, before any judgment can be pronounced against a person, there must be a trial of the issue upon which the judgment is given. A proceeding of this character, where there is no hearing, where a superintendent of an institution arbitrarily returns a man to prison, without having a hearing at which an attorney is present, or some friend is present, or he is in some manner represented, is in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The proceedings now approved by the State Supreme Court of California resemble more the actions of dictatorships as they existed in Germany, Italy and Russia during

the war. There, that is, in Germany, a single doctor, by a single decree, declared that a man was insane and sent him to his death. In the present proceedings, a doctor by a single decree declared the man sane and sentenced him to his death. Both are products of a single dictator—the thing we fought against in a great war.

The California State Supreme Court relies on a Georgia statute and a case decided by the Supreme Court of the United States, to-wit: *Nobles* v. *Georgia*, 168 U. S. 398, at page 404, in support of the position that the Court takes in the majority opinion. A careful analysis of that case, however, supports not the Court's contention, but our contention. In that case, a Georgia statute provided for the determination of insanity on the suggestion of a person after conviction of crime. The statute also provides further:

> "and at any time thereafter, when it shall appear *to the said presiding Judge*, either by inquisition or otherwise, that the said convict is of sound mind, the said Judge shall issue a new warrant, directing the Sheriff to do execution of said sentence."

Thus it is apparent that before the *judicial* determination can be set aside that a *presiding Judge must by inquisition or otherwise* determine *judicially* that the said proceedings be set aside.

This is quite different from the proceedings provided by the California statute and the California decision that a doctor and administrative officer, without taking any testimony by *inquisition or otherwise*, can set aside the *solemn judicial determination of a court*, which tried the issue and a judicial determination by a jury that the defendant is insane.

Furthermore, the decision of the Supreme Court of the United States referred to, comments on the fact that there

was adequate administrative and quasi-judicial process for the purpose of investigating the question of insanity.

That case dealt with a statute providing for the determination of insanity, not for the determination of the restoration of sanity. Furthermore, the statute was like section 3700 of the Penal Code of California, which provides for the determination of insanity. It is apparent that adequate safeguards are provided in this State for the determination of insanity. The Court has now stretched the statutes to provide for inadequate determination of the restoration of sanity. No case is cited by the majority of the Supreme Court, and we believe none can be found, that holds that the restoration of sanity may be determined by an administrative officer without notice, without hearing and without representation of counsel. None of the cases referred to by the Court in 49 A. L. R. 804, wherein are summed up various cases, referring to the determination of insanity, hold that a person may be found insane without notice, or hearing or without adequate administrative or judicial processes of some kind or other for the purposes of an adequate hearing on the question of insanity.

In California, such proceedings have been held to be unconstitutional where they fail to provide for adequate judicial determination of the issue of insanity. *In Re Lambert*, 134 Cal. 626, 66 Pac. 851.

Petitioner herein was given a hearing in accordance with section 3700 *et seq.* of the Penal Code on the question of his insanity. He was tried by a jury, and a judicial judgment was entered declaring him to be legally insane. In that proceeding he was afforded due process. He was permitted the processes of the Court; he was given notice and an opportunity to be heard. But when the proceedings were had before the doctor of the State Hospital, no such hearing was had. He was not represented by counsel; he did not have the opportunity to produce any evidence, nor was he

in a mental condition to produce any evidence because he was then insane, and there has been no denial of the petition for the writ that his insanity still continues. Yet, a proceeding is permitted, according to the Court's decision, wherein Phyle, although insane and not competent to handle his own defense, and not represented by counsel, was declared sane by the doctor, and on this declaration alone is being sent to his doom.

A defendant in a criminal proceeding is entitled to be represented by counsel at every stage of the proceedings, and is entitled to notice and a hearing, the first essentials of due process of law, or he is denied due process of law. *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158.

The right to counsel is guaranteed to a person charged with crime at every stage of the proceedings. See the following cases:

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158;
White v. *Ragan*, 324 U. S. 760, 89 L. Ed. 1348;
Rice v. *Olson*, 324 U. S. 786, 89 L. Ed. 1367;
House v. *Mayo*, 324 U. S. 42, 89 L. Ed. 739.

The rights involved here are fundamental rights protected by the Fourteenth Amendment to the Constitution of the United States. The rights to habeas corpus proceedings to protect those fundamental rights are guaranteed by the Constitution of the United States.

Ng Fung Ho v. *White*, 259 U. S. 276, 66 L. Ed. 938;
Mooney v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791;
Smith v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859;
Woods v. *Nierstheimer*, 328 U. S. 211, 90 L. Ed. 1177;
Ex Parte Hawk, 321 U. S. 114, 88 L. Ed. 572.

In *Cox et al.* v. *U. S.*, 16 L. W. 4029, at 4033, it is said:

"Petitioner claims that his status as a minister is a 'jurisdictional fact' which may be determined *de novo*

(reexamination of the record of the former hearing with right to adduce additional evidence) in a criminal trial, and relies on *Ng Fung Ho* v. *White*, 259 U. S. 276, where we held that an alleged alien was entitled to a judicial trial on the issue of alienage in *habeas corpus* proceedings. But that case is different from this. The alien, there, claimed American citizenship. As such, this Court said, he had a right to a judicial hearing of his claim as a matter of due process. This he could not get before the Commissioner of Immigration. Therefore, since the deportation of a citizen may involve 'loss of all that makes life worth living,' this Court decided that the 'jurisdiction' of the Commissioner to try the alleged alien could be tested by *habeas corpus*. P. 284. That gave the alleged alien a judicial hearing. In these cases judicial review of administrative action is allowed in the criminal trial. This assures judicial consideration of a registrant's rights. Petitioners' objection on this point is in essence that the review is limited to evidence that appeared in the administrative proceeding. It seems to us that it is quite in accord with justice to limit the evidence as to status in the criminal trial on review of administrative action to that upon which the board acted. As we have said elsewhere the board records were made by petitioners. It was open to them there to furnish full information as to their activities. It is that record upon which the board acted and upon which the registrants' violation of orders must be predicated."

The denial to an accused of the right to habeas corpus denies him a right guaranteed by the Federal Constitution. The decision of the Supreme Court of California overrules decisions that hold that an administrative agency may not overrule a judicial decision of a court, and overrules the previous holding of the State Supreme Court in *Laisne* v. *State Board of Optometry* and of this Court. See the following cases:

Laisne v. *State Board of Optometry*, 19 Cal. (2d) 831, 133 Pac. (2d) 451;

Rummy v. *State Board of Funeral Directors*, 13 Cal. (2d) 85, 87 Pac. (2d) 848);
McDonough v. *Goodcell*, 13 Cal. (2d) 752;
St. Joseph's Stockyard Co. v. *U. S.*, 298 U. S. 38, 80 L. Ed. 1033;
Ohio Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908;
Crowell v. *Benson*, 285 U. S. 22, 76 L. Ed. 598.

In the case of *Laisne* v. *State Board, etc.*, not only the majority opinion but the minority opinion holds that there must be substantial evidence before the administrative agency. No evidence was taken before the doctor. Therefore, both according to the majority opinion and according to the minority opinion, since there was no evidence taken, the determination of the doctor, administrative agency, is of no force or effect.

Judicial questions must be determined by a court, as in the Georgia statute referred to in *Nobles* v. *Georgia*, 168 U. S. 398, 404, not by a doctor at a hospital. The value of the opinion of the doctor may determine in this proceeding just the same as it should be determined in any other habeas corpus proceeding by the finder of the fact, the judge, not the doctor. Here, the power is vested solely in the doctor, and not a court, and a doctor is thus empowered to nullify the solemn judgment of a court and the finding of 12 jurors on an issue of fact. The statute does not give the doctor that power, but the Supreme Court of California has given it to him in its opinion. The statute says:

"When he becomes sane"

and further provides:

"When the defendant recovers his reason the Superintendent must certify that fact."

This contemplates a judicial determination of the fact of recovery of reason. A doctor may testify to that fact in a judicial proceeding, the habeas corpus proceeding, but until the court itself has determined that fact from all the evidence before it, then . . . judicial determination has been nullified by a single person whose views may or may not be ultimately accepted by a court as the true finding of fact. Such a procedure or proceeding, we respectfully submit, violates due process of law.

III

The Supreme Court of California erred in its opinion that the statute, as construed by that Court, is not in violation of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States and in holding that the statute is not special, partial and arbitrary.

We can think of no more arbitrary statute than section 3704 of the California Penal Code, which permits a doctor, without evidence, and arbitrarily, to declare a man sane—without trial, without hearing.

Procedural due process is not concerned with the result, but only the manner of its enforcement.

Snyder v. *Mass.*, 291 U. S. 97, 78 L. Ed. 674;
Hysler v. *Florida*, 315 U. S. 411, 86 L. Ed. 932.

Certainly the procedure followed by California proposing to execute an insane man without any judicial process being afforded to him is contrary to the fundamental fairness essential to the very concept of justice in America.

Smith v. *O'Grady*, 312 U. S. 329, 85 L. Ed. 859;
Mooney v. *Holohan*, 294 U. S. 103, 79 L. Ed. 791;
Ng Fung Ho v. *White*, 259 U. S. 276, 66 L. Ed. 938;
Cox et al. v. *U. S.*, 16 L. W. 4029, 4033.

Where proceedings have been held which fail to provide for adequate judicial determination of the issue of whether one is insane, and where such determination is based solely upon the acts of a doctor, with no hearing, such procedure has been held to violate due process of law. *In Re Lambert*, 134 Cal. 626; 66 Pac. 851. The same should be true on the question of restoration of sanity.

Petitioner William Jerome Phyle was given a hearing in accordance with Section 3700 *et seq.* of the Penal Code on the question of his insanity. He was tried by a jury, and a judicial judgment was entered declaring him to be legally insane. In that proceeding he was afforded due process. He was permitted the processes of the Court; he was given notice and an opportunity to be heard. But when the proceedings were had before the doctor of the State Hospital, no such hearing was had. He was not represented by counsel; he did not have the opportunity to produce any evidence, nor was he in a mental condition to produce any evidence because he was then insane, and there has been no denial of the petition for the writ that his sanity still continues. Yet, a proceeding is being permitted, according to the Court's decision, wherein Phyle, although insane and not competent to handle his own defense, and not represented by counsel, was declared sane by the doctor and on this declaration alone, is being sent to his doom.

An insane defendant is entitled to be represented by counsel even more than a sane person. Society must protect him since he cannot protect himself. He or his counsel is entitled to notice and a hearing, or there is denial of due process of law.

Powell v. *Alabama*, 287 U. S. 451, 77 L. Ed. 158.

In the case of *In Re Lambert*, 134 Cal. 626 (66 Pac. 851), the Court said:

> ". . . the statute which enabled a person to be declared insane on the certificate of two medical exam-

iners, is void as depriving a person of his liberty without due process of law in not giving the alleged insane person notice and opportunity to be heard."

If such a statute is in violation of due process of law in not giving the alleged insane person notice and an opportunity to be heard on the question of his insanity, it is equally void as depriving a person of his liberty in not giving him an opportunity to be heard on the question of his restoration to sanity. The Court in the *Lambert* case said:

> "The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may by its authority be done."

An order for the return of the defendant, Phyle, to the State Prison for execution is essentially a judgment by which the defendant is to be deprived of his rights, and it is a cardinal principle in English jurisprudence that before any judgment can be pronounced against a person, there must have been a trial of the issue from which the judgment is given. A proceeding where there is no hearing at which the attorney is present or represented by any person, or an attorney of his choice, is in violation of due process of law. See *In Re Lambert*, 134 Cal. 626.

The right to counsel is fundamental. See the following cases:

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158;
White v. *Ragan*, 324 U. S. 760;
Rice v. *Olson*, 324 U. S. 786;
House v. *Mayo*, 324 U. S. 42.

The rights involved here are fundamental rights protected by the Fourteenth Amendment to the Constitution of the United States. The right to habeas corpus proceed-

ings to protect those fundamental rights is guaranteed by the Constitution of the United States.

Mooney v. *Holohan*, 294 U. S. 103;
Smith v. *O'Grady*, 312 U. S. 329;
Woods v. *Nierstheimer*, 328 U. S. 211;
Ex Parte Hawk, 321 U. S. 114.

California, as a part of the Union, is bound by the Fourteenth Amendment. Its own due process grants the right to habeas corpus. Cal. Const. Art. I, Section 5.

Judicial questions must be determined by a Court after a full hearing, not by a doctor of a hospital. We can think of nothing more resembling the powers of dictators.

Cox v. *U. S.* 16 L. W. 4029;
Ng Fung Ho v. *White*, 259 U. S. 276.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. (Art. I, sec. 9, U. S. Constitution.)

IV

The Execution of an insane person is so abhorrent to principles of justice as to offend due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and no State should carry out such an execution without a legal determination that the person about to be executed is not insane.

As early as Blackstone, and throughout the history of the English speaking people, the execution of an insane person has been regarded as abhorrent to the basic principles of justice which lie at the base of our institutions.

In his commentaries, book 4, sec. 24 (Cooley's Blackstone, Fourth Edition, Vol. 2, p. 1230) it is set forth as follows:

"Also if a man in his sound memory commits a capital offense, and before arraignment day, he becomes

mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his sense before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non sane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution. Indeed, in the bloody reign of Henry the Eighth, a statute was made, which enacted that if a person, being *compos mentis* (of sane mind) should commit high treason, and after falling into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this *savage and inhuman law* was repealed by the statute 1 and 2, P. & M., c. 10. For as is observed by Sir Edward Coke, 'the execution of an offender is, for example, *ut poena ad paucos, metus ad omnes perveniat* (that the punishment may reach the few, but the fear of it affect all);' but so it is not when a madman is executed; he would be a miserable spectacle, both against law, and of extreme inhumanity and cruelty and can be no example to others."

It is respectfully submitted that there could be no more shocking spectacle, nor no more act offensive to the basic and fundamental principles of justice that lie at the base of our institutions of American Government, than to execute an insane person.

Not even the third, fourth or fifth electric shock of an attempted execution could exceed the inhumanity of executing an insane person. See *Resweber* v. *Louisiana*, 329 U. S. 459.

V

The execution of a person on the single statement of a superintendent of hospital after such execution has been halted by the verdict of a jury that such person is insane constitutes cruel and unusual punishment in violation of the Eighth Amendment and Fourteenth Amendment to the Constitution of the United States.

As pointed out under Point IV Blackstone commented that the execution of an insane person is "a miserable spectacle and is of extreme inhumanity and cruelty." While this Court has said that the Fourteenth Amendment would "prohibit by its due process clause execution by a State in a cruel manner" (*Resweber* v. *Louisiana*, 329 U. S. 459) historically the execution of an insane person has always been regarded as contrary to concepts of justice and freedom by a progressive society.

It is unthinkable that any State should permit the execution of an insane person. There is something inhuman and barbarous—something more than the mere extinguishment of life in such a proceeding. (*Resweber* v. *Louisiana, supra*, quoted with approval from *In Re Kemmler*, 136 U. S. 443, 444, 34 L. Ed. 519; *Resweber* v. *Louisiana*, 329 U. S. at 476.)

VI

The ordering of the execution of an insane person, without notice, without opportunity to be heard, without judicial review, and without counsel of his choice or of his friends or representatives to have an opportunity for judicial review, is so lacking in fundamental fairness as to violate both due process of law and to constitute cruel and unusual punishment inherent in the Fourteenth Amendment to the Constitution of the United States by reason of its presence in the Eighth Amendment to the Constitution of the United States.

We can think of no greater act of cruelty, nor any procedure more lacking in due process of law than to deny an insane person the benefit of counsel in a judicial hearing, with the full protection of the Court, before his execution. Such a person needs representation more than a sane or ignorant person. He needs representation to protect his fundamental rights. To rush him off to execution without notice, without hearing, and without judicial review, is contrary to the concepts of a civilized society which lie at the base of our institutions.

See *Lisenba* v. *California*, 314 U. S. 219, 86 L. Ed. 166; "Immutable principles of justice, which inhere in the very idea of free Government." *Holden* v. *Hardy*, 169 U. S. 366, 389, 42 L. Ed. 780, 790. "Fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana*, 272 U. S. 312, 316, 71 L. Ed. 270, 273.

"Immunities implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 324, 325, 82 L. Ed. 288, 292. "Principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Snyder v. *Commonwealth of Mass.*, 291 U. S. 97, 105, 78 L. Ed. 674, 677.

Hurtado v. *California*, 110 U. S. 516, 530, 28 L. Ed. 232, 236;

Twining v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97;

Adamson v. *California*, 332 U. S. 46, 91 L. Ed. 1464.

Cruel and unusual punishments are punishments of a barbarous character and unknown to the common law, being such as disgraced the civilization of former ages, and made one shudder with horror to read of them. *In Re O'Shea*, 11 Cal. App. 568; 105 Pac. 776.

This Court is in duty bound under the Seventh Amendment to the Constitution of the United States to reexamine this case in the light of common law principles.

We respectfully pray for reversal of the judgment and order of the Supreme Court of California.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

(5877)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

No. 655

WILLIAM JEROME PHYLE, *Petitioner,*

vs.

CLINTON T. DUFFY, Warden of the State Prison at San Quentin, State of California, *Respondent.*

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

After proceedings duly had and taken, William Jerome Phyle was found guilty of first degree murder in the Superior Court of the State of California and on February 20, 1946 he was sentenced to death.

The conviction was affirmed by the Supreme Court of the State of California on August 6, 1946. (*People v. Phyle,* 28 Cal. 2d 671.) Thereafter the sentence of

death was reimposed on August 18, 1946 and the date of execution was set for December 26, 1946.

On December 24, 1946, a jury, after due proceedings, adjudged William Jerome Phyle to be insane and he was committed to the Mendocino State Hospital at Talmage, California. On January 18, 1947 the Superintendent of the Mendocino State Hospital at Talmage, California, certified to the Governor that said William Jerome Phyle had recovered his reason (R. 13); thereafter, and on January 30, 1947 the Governor issued to the Warden of the State Prison at San Quentin his warrant appointing May 2, 1947 as the date for the execution of said William Jerome Phyle. (R. 15.)

On April 30, 1947 (three days prior to the date set for the execution) a petition for a writ of habeas corpus was addressed to the Supreme Court of the State of California seeking a stay of the impending execution on the ground that Phyle was still insane. (R. 1.). The writ issued and the execution was stayed pending the final ruling on the petition. (R. 6.) The return of the Warden of the prison contained the first death warrant (R. 7), the order directing the confinement of Phyle in the State Hospital for the Insane. (R. 12.) This commitment directed that:

> "It is Further Ordered that when said William Jerome Phyle recovers his reason, that the Superintendent of the State Hospital in which he is confined certify that fact to the Governor of the State of California for further proceedings as is required by law." (R. 12.)

The return of the Warden also disclosed a certificate from the Superintendent of the State Hospital for the Insane to the effect that said William Jerome Phyle "is presently sane and in possession of his reason" (R. 13, 14) and the Governor's Warrant dated January 30, 1947 fixing the date of execution as May 2, 1947. (R. 15.)

On November 10, 1947, the Supreme Court of California discharged the writ of habeas corpus (R. 16-28) (30 Advance Cal. Reports 843) and on December 8, 1947 a petition for a rehearing was denied by that Court. (R. 49.)

The execution of Phyle was re-set for March 12, 1948.

Again a last minute stay of execution was sought and obtained from this Court on March 8, 1948, upon the filing of an application for certiorari. A writ of certiorari was issued (R. 49) and the matter is now before this Court.

ARGUMENT.

The question of supervening insanity cannot be urged as a matter of right after the date for execution is fixed. Any and all matters growing out of such a situation are within the control of the Legislature. (24 *C. J. S.* 198.)

> "Under the common law, an inquisition to determine the mental condition of a person convicted of crime and under sentence of death, but who, it was alleged, had become insane since ren-

dition of judgment was under the control of the trial court and that court alone decided when an inquisition was warranted. There was no provision for a jury trial and no appeal would lie from the finding of the court. 4 Blackstone's Commentaries 395; Nobles v. State of Georgia, 168 U. S. 398, 18 S. Ct. 87, 42 L. Ed. 515; People v. Preston, 345 Ill. 11, 177 N. E. 761; Ex parte Chesser, 93 Fla. 291, 111 So. 720; People v. Eldred, 103 Colo. 334, 86 P. 2d 248.

"This common-law rule stemmed from the authority given in early English history to the sheriff or officer having the prisoner in custody under sentence of death to make an inquisition into his sanity where he had reason to believe that the prisoner had become insane since he had been placed in confinement. The sheriff had authority to call for such assistance as he might see fit to advise with him in the case. No appeal was contemplated and the inquiry was for the purpose of determining the one proposition as to whether the prisoner had become totally bereft of his senses so that he in no way understood why he was imprisoned or the punishment which was about to be meted out to him."

Bingham v. State (Okla. C. C. A.), 169 P. 2d 311, 314.

The Supreme Court of the United States in the case of *Nobles v. State of Georgia,* 168 U. S. 398, at pages 405 and 409, 42 L. Ed. 515 at pages 518 and 519, has followed this rule in a case in which there was a suggestion of the insanity of a prisoner who was about to be sentenced to death. The Court held that the

prisoner in such case was not entitled to a jury finding as to his insanity and that the manner in which the question of his sanity was to be determined was purely a matter of legislative regulation and therefore within the control of the state legislature. The following quotations from this case set forth the rule:

"From these considerations it follows that the only question which we are called upon to determine is whether, after a regular conviction and sentence a suggestion of a then existing insanity is made, it is necessary, in order to constitute due process of law, that the question so presented should be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common-law jury trial and even although by the state law full and adequate administrative and quasi-judicial process is created for the purpose of investigating the suggestion. Without analysis of the contention, it might well suffice to demonstrate its obvious unsoundness by pointing to the absurd conclusion which would result from its establishment. If it were true that at common law a suggestion of insanity after sentence created on the part of a convict an absolute right to a trial of this issue by a judge and jury, then (as a finding that insanity did not exist at one time would not be the thing adjudged as is its nonexistence at another) it would be wholly at the will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.

* * * * * * *

"It being demonstrated by reason and authority that at common law a suggestion made after verdict and sentence of insanity did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, *it followed that the manner in which such question should be determined was purely a matter of legislative regulation. It was therefore a subject within the control of the state of Georgia.* Because we have confined our opinion exclusively to the question before us, that is, the right arising on a suggestion of insanity after sentence, we must not be understood as implying that a different rule would prevail after verdict and up to and including sentence, or as passing upon the question whether, under the 14th Amendment, a state is without power to relegate the decision of a question of insanity, when raised before conviction, to such apt and special tribunal as the law might deem best." (Emphasis ours.)

It must be evident therefore that if a prisoner is not entitled in a case such as the present one, to a jury trial to determine his sanity or insanity in the first instance neither is he entitled to a jury on the question of his restoration to sanity.

The Georgia Supreme Court, in the case of *Talley v. Beavers,* 80 S. E. 556, 557, is authority for the proposition that the certificate of the superintendent of a state hospital showing that a prisoner was released as not insane removes any presumption that may have existed as to the condition of the mind of the person on the date when he was adjudged insane

and that he might be re-committed on the judgment previously rendered against him. We quote the pertinent part of the decisions:

"* * * And at the hearing of the application in this case it appears that Talley, the person detained in custody, was discharged from the sanitarium on October 14, 1912, 'as not insane.' This was shown by a certificate signed by the superintendent of the institution. This certificate was admitted in evidence over the objection that there was a higher evidence, and that the fact shown by the certificate was not properly certified; but the objection was overruled, and no exception was taken by the plaintiff in error to this ruling.

"Considering the provisions of the Code section quoted above, *and the certificate of the superintendent of the state sanitarium showing that the prisoner was released 'as not insane,' any presumption that may have existed that the condition of mind of the person on the date when he was adjudged insane was continuing at the time of his rearrest was sufficiently overcome*, even if it was necessary to introduce any evidence at all to show that the discharged inmate of the asylum was not in the same mental condition as that in which he was at the time of his confinement. If the condition of H. W. Talley's mind became so impaired after his conviction of the offenses against the municipal ordinances for which he was tried, convicted, and sentenced that it would be improper to enforce the performance of the sentences, still they could be enforced after his restoration to sanity, and no argument nor citation of authorities is necessary to show this; for

> even capital sentences which are suspended under our statutes in cases where the convict becomes insane after conviction may, upon his restoration to sanity, be executed." (Emphasis ours.)

The Supreme Court of California has had occasion to consider the adequacy of the statutory provisions governing cases in which a prisoner becomes insane after judgment of death. In referring to sections of the code involved in this case the Court said that:

> "Equally adequate statutory provision is made for the complete protection of the rights of the defendant who may become insane after his conviction and sentence."
>
> (*People v. Sloper*, 198 Cal. 601.)

The Court then refers to the fact that when a defendant, under condemnation of death recovers his reason the superintendent of the hospital must certify that fact to the warden who must thereupon issue a warrant and appoint the day of execution. The Court then goes on to say:

> "We must conclude, therefore, that it was the intent of the Legislature to limit the jurisdiction of the trial court in proceedings of this nature, to the making of the orders necessary to carry the judgment into effect."
>
> (*People v. Sloper*, 198 Cal. 601.)

The following quotations from the case of *People v. Superior Court*, 4 Cal. (2d) 136, demonstrates the adequacy of the statutory procedure outlined in *Penal Code* sec. 3704:

"It is important to keep in mind the fact that the procedure prescribed by the Penal Code is entirely distinct from that prescribed by the Code of Civil Procedure and the general and more comprehensive law relating to insane and incompetent persons and their commitment to, confinement in and discharge from State Hospitals.

"* * * After a person has been committed to either of the insane asylums on a charge of insanity, and received into the asylum, no court in the state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon a writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is fixed exclusively in the officers of the asylum. * * * The Penal Code does not undertake to deal with such subjects. It prescribes a summary procedure for the determination of the question as to whether the defendant is so far mentally affected as to prevent him from defending himself against the crime with which he is charged. The procedure merely defines the duty of the judge, district attorney, and the sheriff and superintendent of the state hospital, all of whom are officers who either have the custody of the defendant or who are charged with the performance of judicial or executive duties in the prosecution of persons charged with the commission of crime. *The Penal Code undoubtedly prescribes the exclusive manner by which the proceedings shall be set in motion when the defendant is restored to sanity or is not insane.*"

The procedure provided for by sec. 3700, et seq. of the Penal Code of California, found its way into the law of this state at a very early date. Substantially the same procedure was set out in the first *"Criminal Practice Act."* (Stats. of Calif. 1850, p. 312.)

Sec. 505 of this, the earliest criminal practice act, read as follows:

> "If it be found by the inquisition that the defendant is sane the Sheriff shall execute the judgment; but if it be found that he is insane, the Sheriff shall suspend the execution of the judgment until he receive a warrant from the Governor or from the Judge of the District Court of the county, directing the execution of the judgment."

By California Stats. 1851, p. 212, the Legislature adopted the *Criminal Practice Act of 1851* and in sec. 473 thereof it re-enacted the quoted section of the *Criminal Practice Act of 1850.*

When the California Penal Code was adopted in 1872, secs. 473 and 474 of the *Criminal Practice Act of 1851* became sec. 1224 of the *Penal Code* and the section read as follows:

> *"If* it is found by the inquisition that the defendant is sane, the sheriff must execute the judgment; but if it is found that he is insane, the sheriff must suspend the execution of the judgment until he receives a warrant from the Governor or from the Judge of the Court by which the judgment was rendered directing the execution of the judgment. If the inquisition finds

that the defendant is insane, the sheriff must immediately transmit it to the Governor, who may, when the defendant becomes sane, issue a warrant appointing a day for the execution of the judgment."

By California Stats. 1905, p. 699, sec. 1224 of the *Penal Code of California* was amended to read as follows:

"If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution, and transmit a certified copy of the order mentioned in the last section to the governor, and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent of such hospital must certify that fact to the governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment."

It will be noted that by the 1905 amendment all reference to the Superior Court was omitted and that the Governor was directed to issue his warrant upon receipt of the certificate of the superintendent of the hospital certifying to the recovery of the prisoner.

What was formerly sec. 1224 of the *Penal Code of California* was repealed in 1941 and re-enacted as sec. 3704 of that code with the addition of the following matter at the end of the section:

"And the warden shall ther upon return the defendant to the state prison pending the execution of the judgment."

The use of the executive arm of the government in such cases is not unusual. In England, when the defense of insanity is established, to the satisfaction of the jury, a verdict is brought in that the defendant is guilty, but insane. The result of this verdict is that the Court orders the accused to be kept in custody as a criminal lunatic *until the King's pleasure is known.* (*Criminal Lunatics Act,* 1883, 46 and 47 Vict., C. 38, sec. 2.)

The *Criminal Lunatics Act of 1884,* 47 and 48 Vict., ch. 64 (see Appendix p. i) parallels the California Statute.

The *American Law Institute* in its official draft of a *Code of Criminal Procedure,* secs. 409 to 412, inclusive (see Appendix p. ii), suggests a procedure to be used under circumstances similar to those in this case which closely parallels the California statute. Under this proposed code the finding of insanity in the first instance and the subsequent recovery of reason of a person under sentence to death is entrusted to a commission of physicians appointed by the Governor of the State and to the final decision of the Governor.

The finding of the restoration to sanity and the consequent execution of the prisoner is entrusted to the Governor of the State without reference to a

Court by statute in thirteen states.[1] In four states the medical officer reports his findings as to recovery to a judge who acts on the certificate of the medical officer.[2] There is no provision for a jury determination or other hearing. The statutory provisions of the several states are set out in the commentaries to the *Official Draft of the Code of Criminal Procedure*, page 1150 (American Institute of Law).

DUE PROCESS OF LAW.

"* * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *" (sec. 1, 14th Amend. *Const. U. S.*)

We are not concerned with a deprivation of property.

There is no question of liberty involved here. Phyle was deprived of his liberty by his trial in the State Court which culminated in a conviction for murder. At his trial he was afforded "due process of law." Sane or insane he is not entitled to his liberty.

Is he being deprived of his life without "due process of law"?

His life was declared forfeited in the original trial for murder. The warrant for his execution was issued

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[1]Arizona, California, Idaho, Mississippi, Missouri, Montana, Nevada, North Dakota, Ohio, Oklahoma, Utah, Virginia, Wyoming.

[2]Georgia, Nebraska, New Jersey, New York.

in that proceeding. (R. 10.) All that the Governor has done is fix the date for the execution of the warrant. (R. 16.) We repeat—at this trial Phyle was afforded "due process of law." No question has been raised on this score.

The action of the Medical Superintendent of the Mendocino State Hospital and of the Governor of California is not the action which deprives Phyle of his life. These actions only affirm that Phyle is sane. Being sane the law which was temporarily interrupted moves on.

Phyle cannot now complain of lack of "due process" in his criminal trial, therefore he is not being deprived of his life without "due process."

Looking at his complaint logically he is asserting an absurd proposition—

He complains that he has been deprived of his constitutional right to remain insane without due process of law!

This is something new.

The books are full of cases in which individuals have complained of the deprivation of their liberty without due process by reason of an adjudication of insanity.

The death penalty is not being invoked because Phyle is sane—he is to be executed because he was convicted of a brutal murder.

We have pointed out that the restoration proceeding has followed "the law of the land."

From the earliest common law to the present date by tradition and statute the State acting through the executive arm has refused to execute insane persons as a matter of grace. This grace of the sovereign has in modern times been regulated by statute. The *American Law Institute* has compiled the American statutes. *Halsbury* states the English law as follows:

> "If it appears to the Secretary of State, either from a certificate signed by two members of the visiting committee of the prison or otherwise, that a prisoner lying under sentence of death may be insane, he is to appoint two or more medical practitioners to examine the prisoner and report, in writing, upon his sanity, and they, or the majority of them, may certify, in writing, that he is insane.
>
> "A person ceases to be a criminal lunatic (1) if he is remitted to prison by a warrant of the Secretary of State issued upon a certificate from two medical practitioners that he is sane; (2) if he is absolutely discharged by a warrant of the Secretary of State; (3) when the term of penal servitude or imprisonment to which he is subject expires."
>
> 26 *Halsbury's Laws of England*, p. 207.

CONCLUSION.

William Jerome Phyle, on whose behalf the petition in this case has been filed, stands committed on a warrant for his execution. This warrant was issued pursuant to a statutory procedure which has existed in California from the very commencement of the laws of the State. This procedure finds its basis in the common law and is generally perpetuated by statute in England and in this country. The Supreme Court of the United States has held that such a procedure is legal and proper.

The legislative intent is emphatically expressed in sec. 3700 of the *Penal Code of California* as follows:

> "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken."

All of the rights to which Phyle is entitled have been observed. The Warden of San Quentin has shown himself capable of understanding the functions of his office and has heretofore made suggestion as to the insanity of Phyle. That suggestion was acted upon with the result that Phyle was committed to an insane asylum and later released as restored to sanity. If the warden should believe that Phyle is now insane he could again institute the appropriate proceedings.

We submit that this Court should recognize the intent of the Legislature as expressed in sec. 3700 of

the *Penal Code of California* and dismiss the writ of certiorari.

Dated, San Francisco, California,
April 2, 1948.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California,

CLARENCE A. LINN,
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Attorneys for Respondent.

(Appendix Follows.)

Appendix

Criminal Lunatics Act, 1884, 47 and 48 Vict., Ch. 64, sec. 2(4), 3.

(4) "In the case of a prisoner under sentence of death, if it appears to a Secretary of State, either by means of a certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the Secretary of State shall appoint two or more legally qualified medical practitioners, and the said medical practitioners shall forthwith examine such prisoner and inquire as to his insanity, and after such examination and inquiry such practitioners shall make a report in writing to the Secretary of State as to the sanity of the prisoner, and they, or the majority of them, may certify in writing that he is insane."

"* * * Where it is certified by two legally qualified medical practitioners that a person being a criminal lunatic (not being a person with respect to whom a special verdict has been returned that he was guilty of the act or omission charged against him, but was insane at the time when he committed the act or made the omission) is sane, a Secretary of State, if satisfied that it is proper so to do, may by warrant direct such person to be remitted to prison, to be dealt with according to law."

The American Law Institute—Code of Criminal Procedure Official Draft, June 15, 1930, secs. 409-412.

Section 409. *"Execution of sentence of death—who may suspend.* The execution of a sentence of death shall not be suspended or stayed, apart from the stay incident to an appeal, except by the governor."

Section 410. *"Proceedings when person under sentence of death appears to be insane.* If there is reasonable ground to believe that a defendant under sentence of death has become insane since he was sentenced the ..... shall immediately notify the governor thereof who shall suspend execution of the sentence until he issues a warrant for its execution. On suspending sentence the governor shall appoint a commission consisting of two competent disinterested physicians to examine into the defendant's mental condition. The commission so appointed may call and examine witnesses and compel their attendance. The commission shall report its finding to the governor. The physicians constituting the commission shall be allowed such fees as the governor deems reasonable, which fees shall be paid by the state."

Section 411. *"Proceedings if defendant is found sane.* If the governor after receiving the report of the commission provided for in section 410 decides that the defendant is sane, he shall issue a warrant to the ..... directing him to execute the sentence at the time designated in said warrant."

Section 412. *"Proceedings if defendant is found insane—recovery of sanity.* If the governor after receiving the report of the commission provided for in section 410 decides that the defendant is insane he shall take steps to have the defendant committed to the _____. If thereafter the proper officer of such institution is of the opinion that the defendant is sane he shall report this fact to the governor, whereupon the governor shall appoint a commission consisting of two competent disinterested physicians to determine whether the defendant has been restored to sanity. The commission shall have the same powers and be allowed the same fees as are provided for in section 410. If, after the report of the commission, the governor decides that the defendant has been restored to sanity he shall cause the defendant to be returned to the custody of the _____ and shall issue a warrant to the _____ directing him to execute the sentence at a time designated in said warrant."

pp. 6, 7, 8, 9, 10

SUPREME COURT OF THE UNITED STATES

No. 655.—October Term, 1947.

William Jerome Phyle, Petitioner, v. Clinton T. Duffy, Warden of the State Prison at San Quentin, State of California.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 7, 1948.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner is under sentence of death for murder in the first degree imposed by a California superior court and affirmed by the State Supreme Court. 28 Cal. 2d 671, 171 P. 2d 428. The validity of that sentence is not here challenged.[1] But § 1367 of the California Penal Code provides that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." Thus if petitioner is insane, California law prohibits his execution under the death sentence

[1] The opinion of the State Supreme Court affirming petitioner's sentence shows: Upon arraignment in the Superior Court counsel was appointed for petitioner at his request. His pleas were "Not guilty" and "Not guilty by reason of insanity." Later petitioner informed his counsel that he wished to withdraw these pleas and enter a plea of guilty. The trial judge then examined petitioner at length, satisfied himself that the change of plea was voluntarily entered by petitioner with full knowledge of his legal rights, and then accepted it. Evidence was then taken by the court to determine the degree of the murder and to fix the punishment. Two physicians appointed by the court testified that in their judgment petitioner was sane. Other witnesses testified to the facts of the crime. The murder was committed by petitioner while he was in the act of perpetrating a robbery. During the entire proceedings, so the State Supreme Court found from the record, the appointed counsel participated and represented petitioner "with fidelity and proficiency." *People* v. *Phyle*, 28 Cal. 2d 671, 171 P. 2d 428.

which he received. The legal questions here presented relate to the procedures adopted by California to determine whether petitioner is sane or insane as a matter of fact.

It is petitioner's contention that, though having been pronounced insane in a judicial proceeding after his conviction, and though he in fact is still insane, he is about to be executed because a state doctor, acting under authority of state statutes, has declared him restored to sanity. The doctor reached his determination without notice or hearings, and without any opportunity on petitioner's part to obtain an original court hearing and adjudication of his sanity, or even to obtain a court review of the doctor's conclusion that he is sane. This procedure it is argued constitutes a denial to petitioner of that due process of law guaranteed him by the Fourteenth Amendment.

This contention was urged upon the California Supreme Court in habeas corpus proceedings there instituted. That court entertained and considered the petition, but, with two judges dissenting, denied relief, sustaining the validity of the power of the state's executive agents to follow the prescribed statutory procedures. 30 Cal. 2d 838, 186 P. 2d 134. We granted certiorari because of the serious nature of the due process contentions presented in the petition. 334 U. S. —. Here the California attorney general, while supporting the State Supreme Court's denial of habeas corpus, asserts that California affords petitioner an adequate judicial remedy by way of mandamus, a procedure which has not yet been sought by petitioner.

The California procedure may perhaps be better understood by explaining the application of the controlling California statutes to petitioner's case. While he was in prison awaiting execution of the death sentence a question arose concerning the petitioner's sanity at that

time. Section 3701 of the State Penal Code[2] prescribes that if "there is good reason to believe" that a defendant under sentence of death "has become insane, the warden must call such fact to the attention of the district attorney." It is the district attorney's "duty" immediately to institute proceedings in an appropriate trial court to determine the sanity of the defendant, and the court "must at once" summon a jury of twelve to "hear such inquiry." In petitioner's case this prescribed course was followed, a judicial hearing was held as provided by § 3702,[3] and petitioner was adjudged insane. In accordance with § 3703[4] the court then ordered that petitioner "be taken to a state hospital for the insane and be there kept in safe confinement until his reason is restored." It will be noted that the petitioner obtained a judicial

[2] "3701. Insanity of defendant, how determined. If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of twelve persons to hear such inquiry."

[3] "3702. Duty of district attorney upon hearing. The district attorney must attend the hearing, and may produce witnesses before the jury, for which purpose he may issue process in the same manner as for witnesses to attend before the grand jury, and disobedience thereto may be punished in like manner as disobedience to process issued by the court."

[4] "3703. Convict found insane. The verdict of the jury must be entered upon the minutes, and thereupon the court must make and cause to be entered an order reciting the fact of such inquiry and the result thereof, and when it is found that the defendant is insane, the order must direct that he be taken to a State hospital for the insane, and there kept in safe confinement until his reason is restored."

hearing as to sanity only because the warden instituted proceedings after determining that there was "good reason to believe" that the petitioner was insane. Thus, the opportunity for a person under sentence of death to have a hearing before judge and jury on the question of his sanity depends in the first instance solely on the warden.

After adjudication of insanity the petitioner was taken to a state hospital for the insane in compliance with the trial court's order of commitment. In accordance with § 3704 [5] the warden then suspended the death sentence and delivered certified copies of the court's order to the governor and to the medical superintendent of the state hospital to which petitioner was sent. As § 3704 provides, the superintendent was directed that when petitioner "recovers his reason," the superintendent "must certify that fact" to the governor, who is then required to issue to the warden his warrant appointing a day for the execution of the judgment. The warden then returns the defendant to the state prison pending the execution of the judgment. This course was followed with reference to the petitioner. Eighteen days after his admission to the state hospital the medical superintendent certified to the governor that the petitioner

[5] "3704. Convict found sane: Duties of warden. If it is found that the defendant is sane, the warden must proceed to execute the judgment as specified in the warrant; if it is found that the defendant is insane, the warden must suspend the execution and transmit a certified copy of the order mentioned in the last section to the Governor and deliver the defendant, together with a certified copy of such order, to the medical superintendent of the hospital named in such order. When the defendant recovers his reason, the superintendent of such hospital must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the State prison pending the execution of the judgment."

was then sane. He was returned to the custody of the prison warden, and the governor set a new date for his execution.

The medical superintendent's determination of petitioner's sanity was based on his own *ex parte* investigation, no notice or hearings having been afforded petitioner or any person on his behalf. It is thus clear that the California statutory scheme here challenged provides neither an administrative nor a judicial hearing as a prerequisite to a determination that a condemned defendant judicially adjudicated to be insane has been restored to sanity; one man in an *ex parte* investigation decides the question upon which hangs the defendant's life, in the absence of a later request by the prison warden for a judicial hearing on the ground that there is then "reason to believe" the defendant has become insane.

The holding of the State Supreme Court in the habeas corpus proceeding was:

> "There is no authority . . . for the proposition that defendant has a right to habeas corpus or other judicial proceeding to determine the question of his sanity after his release from the state hospital. In fact, section 3700 of the Penal Code[*] expressly prohibits such a proceeding. Once the superintendent certifies that defendant is sane, he is remanded to the custody of the warden for execution and 'No judge, court or other officer other than the Governor' can then suspend the execution of the judgment, 'except the warden of the State Prison to whom he is delivered. . . .'" *In re Phyle*, 30 Cal. 2d at 842–843, 186 P. 2d at 137.

[*] "3700. Governor may suspend. No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken."

For the statements in its opinion that the due process clause of the Fourteenth Amendment conferred no right on a condemned defendant to any kind of judicial adjudication or review on the question of sanity, the State Supreme Court primarily relied on *Nobles v. Georgia*, 168 U. S. 398. We do not think that either the actual holding or what was said in the opinion in that case would necessarily require a rejection of the contentions made here against the California procedures.

The Georgia law under scrutiny in the *Nobles* case provided that the sanity of a person previously condemned to death should be determined by a tribunal formed in the following manner: "The sheriff of the county, *with the concurrence and assistance of the Ordinary thereof*, (emphasis added) shall summon a jury of twelve men to inquire into such insanity. . . ." If this tribunal found insanity the sheriff was required to suspend execution of sentence and report his action to the presiding judge. Restoration of sanity so as to justify execution was to be determined by the presiding judge "by inquisition or otherwise." Thus "the only question" in the *Nobles* case, as the Court there said, was "whether . . . . in order to constitute due process of law" the question of insanity of a condemned defendant must "be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common law jury trial, and even although by the state law full and adequate administrative and *quasi* judicial process is created for the purpose of investigating the suggestion." P. 405. This agency for a hearing to inquire into the prisoner's sanity, composed as it was of sheriff, county judge and jury, was referred to as an "apt and special tribunal." There is provision in the California statutes for a hearing before a judge and jury when, but only when, the warden is of opinion that there "is reason to believe" a defendant is insane.

The *Nobles* case does stand for the proposition that a condemned defendant has no "absolute right" to a hearing on the question of his sanity on his mere "suggestion." Such an absolute right, this Court thought, would make the punishment of a defendant "depend solely upon his fecundity in making suggestion after suggestion, to be followed by trial after trial." P. 406. For this reason, the Court in the *Nobles* opinion cited and quoted from legal commentators and from judicial opinions which emphasized, as the opinion in the *Nobles* case itself emphasized, the importance of leaving to the "discretion of a judge" the most appropriate procedure for determining the sanity of a defendant already sentenced to death. It was in this connection that the Court made the statement in the *Nobles* case upon which the California Supreme Court particularly relied, that "the manner in which such question should be determined was purely a matter of legislative regulation."

Reading this statement in its context and in relation to the Georgia procedure, we do not understand that the Court in the *Nobles* case passed upon the question here urged: whether a state which bars the execution of insane persons can submit to a single individual this question, crucial to life, to be decided by that individual *ex parte*, with or without notice and hearings as the individual may choose, and without any judicial supervision, control or review whatever. The *Nobles* case we do understand to be an authority for the principle that a condemned defendant cannot automatically block execution by suggestions of insanity, and that a state tribunal, particularly a judge, must be left free to exercise a reasonable discretion in determining whether the facts warrant a full inquiry and hearing upon the sanity of a person sentenced to death.[7]

[7] See cases collected in 49 A. L. R. 804, *et seq.*

What has been said previously indicates the gravity of the questions here raised under the due process clause as heretofore construed by this Court, both the contention that execution of an insane man is offensive to the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, *Adamson* v. *California*, 332 U. S. 46; *Carter* v. *Illinois*, 329 U. S. 173, and the different contention that life shall not be taken by a state as the result of the unreviewable *ex parte* determination of a crucial fact made by a single executive officer. See *Ng Fung Ho* v. *White*, 259 U. S. 276.[8] It is not appropriate for us to pass on such constitutional questions in this habeas corpus case if, as the California attorney general contends, there is a state remedy by mandamus available to petitioner under which he can invoke judicial action to compel the warden to initiate judicial proceedings, and in which mandamus proceedings the court will hear and consider evidence to determine whether there is "reason to believe" that the petitioner is insane. *New York ex rel. Whitman* v. *Wilson, Warden*, 318 U. S. 688; *Woods* v. *Nierstheimer*, 328 U. S. 211; *Carter* v. *Illinois*, 329 U. S. 173. See also *Simon* v. *Craft*, 182 U. S. 427, 437.

The State Supreme Court in denying habeas corpus said that the state statutes made "no provision for a judicial determination of the question of the sanity of a defendant delivered to the warden of a state prison for execution except as set forth in § 3701." That is the section which

[8] See also *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369–370; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386, 392; *Duncan* v. *Kahanamoku*, 327 U. S. 304, 322; *Dent* v. *West Virginia*, 129 U. S. 114, 123–124; *Brown* v. *New Jersey*, 175 U. S. 172, 176; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 49–54, and concurring opinion, Brandeis, J., at 76–78. *Cf. United States* v. *JuToy*, 198 U. S. 253, 263, *Simon* v. *Craft*, 182 U. S. 427, 436.

requires a judicial inquiry with a court and jury only when and if the warden certifies that "there is good reason to believe" that a person sentenced to death has "become insane." But it does not necessarily follow from the fact that petitioner cannot obtain a full-fledged judicial hearing as to sanity on his own motion made directly to a state court that he is without some other adequate state remedy. And the state attorney general asserts here that the petitioner does have an "ample remedy, if the facts support him, by application to the California courts for a writ of mandamus" to compel the warden to institute proceedings under § 3701.

Thus we have an unequivocal declaration by the state attorney general that petitioner has not attempted to take advantage of an available state remedy. The attorney general is the highest non-judicial officer of California, and is particularly charged with the duty of supervising administration of the criminal laws.[9] His statement on this question is entitled to great weight in the absence of controlling state statutes and court decisions.[10] Nor is there anything in the State Supreme Court's opinion in this case that need be considered in conflict with the attorney general's opinion. While that court held that there was no statutory provision for petitioner to obtain a sanity hearing except through action by the warden as prescribed in § 3701, it did not hold or even consider whether there was judicial power under state law to compel the warden to do his duty under § 3701. It did declare, clearly and emphatically, that the statute imposed a mandatory obligation on the warden to initiate judicial proceedings if there was good reason to believe a con-

[9] California Government Code §§ 12510–12512, 12519, 12550–12553.

[10] See *Union Ins. Co.* v. *Hoge*, 21 How. 35, 66; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *Driscol* v. *Edison Co.*, 307 U. S. 104, 115.

demned defendant insane, an obligation that continued to rest upon the warden even after certification of restoration to sanity by the medical superintendent. The Supreme Court also declared that this duty would continue up to the very time of execution. Failure of the warden to perform this obligation, so the court said, would be a "violation of section 1367," which section prohibits execution of an insane man. In view of this mandatory obligation upon the warden to initiate proceedings if "there is good reason to believe" a defendant sentenced to death is insane, it would be somewhat anomalous, to say the least, if California courts were wholly without power to correct an executive agent's abuse of authority in a matter of such great significance as the execution of insane persons.

The jurisdiction of California courts to issue mandamus has its source in Art. VI, §§ 4, 4b, 5 of the state constitution. The writ can issue to any inferior tribunal or person to compel an act which the law specifically enjoins. Code of Civil Procedure of California, § 1085. It has been held that the writ may issue against the secretary of state, *Hutchinson* v. *Brown*, 122 Cal. 189, 54 P. 738, or even against the governor. *Elliott* v. *Pardee, Governor*, 149 Cal. 516, 520, 86 P. 1087, 1089.

Petitioner contends, however, that mandamus would not be available under California law if there is another adequate remedy, see *Kahn* v. *Smith*, 23 Cal. 2d 12, 142 P. 2d 13, that here habeas corpus is available, and hence mandamus is not. This contention is fully answered by the State Supreme Court's opinion in this case, holding that neither habeas corpus nor any other remedy is available to test sanity of a condemned defendant, except that remedy under § 3701 which only the warden can institute. Hence, so far as it here appears, mandamus to compel action by the warden is the only available remedy.

Petitioner contends that this remedy is inadequate because under California law no relief could be hoped for in a mandamus proceeding without a showing that the warden's non-action was arbitrary and capricious. We cannot know, of course, just what precise standards the State Supreme Court may hold must be met by petitioner in order to obtain the judicial inquiry provided in § 3701. We are persuaded by the attorney general's statements and brief, and by the state constitution, state statutes, and state decisions to which he referred, that mandamus is probably available, and that in a mandamus proceeding some issues of fact concerning petitioner's sanity can be drawn by the parties, resolved by the courts, and provide support for relief. Different language has been used in different opinions concerning the conditions upon which the writ will issue in California. Although it has been said that generally the writ will issue only to correct an abuse of discretion, *Bank of Italy* v. *Johnson*, 200 Cal. 1, 31–33, 251 P. 784, 795–796 and cases cited, it has also been pointed out that in some circumstances writs can issue to compel action in a particular way. *Wood* v. *Strother*, 76 Cal. 545, 549, 18 P. 766, 769; *Landsborough* v. *Kelly*, 1 Cal. 2d 739, 744, 37 P. 2d 93, 95.

In considering what the issues may be in a mandamus proceeding, it must be borne in mind that the warden is under a mandatory duty to initiate judicial proceedings, not *when* a defendant is insane, but when *"there is good reason to believe"* he is insane. We cannot say at this time that California's remedy by mandamus will be less than a substantial equivalent [11] of one which authorized him to apply directly to a court for a full hearing. For this Court held in *Nobles* v. *Georgia*, *supra*, that in the absence of sufficient reasons for holding a

[11] See *Edison Co.* v. *Labor Board*, 305 U. S. 197, 234; *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 152–153.

full hearing into the sanity of a defendant sentenced to death, a state judge may deny such a hearing consistently with due process. As previously pointed out, the decision in the *Nobles* case emphasized that due process of law had never necessarily envisioned a full court hearing every time the insanity of a condemned defendant was suggested. Applications for inquiries into sanity made by a defendant sentenced to death, unsupported by facts, and buttressed by no good reasons for believing that the defendant has lost his sanity, cannot, with any appropriate regard for society and for the judicial process, call for the delays in execution incident to full judicial inquiry. And a court can just as satisfactorily determine by mandamus as by direct application whether there are good reasons to have a full-fledged judicial inquiry into a defendant's sanity.

In this situation we find no federal constitutional question presented which is ripe for decision here. So here, as in *Woods* v. *Nierstheimer*, *supra*, being unable to say that the judgment denying habeas corpus may not rest on an adequate non-federal ground, the writ of certiorari is

Dismissed.

SUPREME COURT OF THE UNITED STATES

No. 655.—October Term, 1947.

William Jerome Phyle, Petitioner, v. Clinton T. Duffy, Warden of the State Prison at San Quentin, State of California.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 7, 1948.]

Mr. Justice Frankfurter, whom Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge join, concurring.

Where life is at stake one cannot be too careful. I's had better be dotted and t's crossed. And so I deem it proper to state my understanding of the opinion of the Court, on the basis of which I concur in it.

We granted certiorari to review a decision of the Supreme Court of California which dismissed *habeas corpus* proceedings brought in that court. We did so on the assumption that the case raised questions under the Fourteenth Amendment—more particularly, whether an unreviewable determination by the superintendent of a State hospital, that one convicted of murder and found to have become insane after conviction had been restored to sanity and therefore was subject to execution, was consistent with the due process which the Fourteenth Amendment secures. The Court now finds that all that the California Supreme Court did was to hold that as a matter of California procedure the petitioner's claim could not be passed on by the direct remedy of *habeas corpus*, but that there is available a special local remedy, labeled mandamus, whereby the petitioner can judicially test his present sanity. In short, the Court dismisses the writ of certiorari because the decision of the court below rests on a purely State ground in that there is a State remedy

available, which has not been pursued, by means of which he can secure the rights he claims under the United States Constitution.

Of course I recognize the weight to be attached to the Attorney General's views regarding the law of California. But the controlling voice on California law is that of the Supreme Court of California. Whatever may be the elegancies of procedure by which the matter is to be determined, our decision declining to consider the grave constitutional issues which we thought we had before us, is contingent upon a determination by the Supreme Court of California that the law of that State is what our decision presupposes it to be, namely, that California by a remedy which California chooses to call mandamus enables the present petitioner to secure a judicial determination of his present sanity. This means, of course, not the very restricted scope of relief which is normally associated with the traditional remedy of mandamus. It presupposes that California affords petitioner the means of challenging in a substantial way the *ex parte* finding of the Superintendent of the State Hospital for the Insane and enables him to secure judicial determination of the claims he has made in his petition for *habeas corpus* which, so the Court now holds, is not the proper way to proceed.

Upon this view I concur in the decision and opinion of the Court.